TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

No. 190.

FRANK KIHM, PLAINTIFF IN ERROR,

vs.

THE STATE OF NEW JERSEY.

IN ERROR TO THE COURT OF ERRORS AND APPEALS OF THE STATE OF NEW JERSEY.

FILED JULY 6, 1914.

(24,837)

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a New Jersey Court of Errors and Appeals.

2593.

STATE OF NEW JERSEY, Defendant-in-Certiorari, Defendant-in-Error,
vs.
FRANK MIHM, Prosecutor, Plaintiff-in-Error.

In Error to Supreme Court.

State of Case.

Thomas G. Haight, Attorney for Defendant-in-Certiorari, Defendant-in-Error.
Edwards & Smith, Attorneys for Prosecutor, Plaintiff-in-Error.

1 *Writ of Error.*

(Filed March 3, 1913.)

NEW JERSEY, *ss:*

[SEAL.]

The State of New Jersey to the Chief Justice and Other Justices of Our Supreme Court of Judicature, Greeting:

Forasmuch as in the record and proceedings and also in the giving of judgment in a certain plaint which was in our said Supreme Court of Judicature, before you, between Frank Mihm, Prosecutor and State of New Jersey, defendant in an action on certiorari manifest error hath intervened to the great damage of the said prosecutor, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our Judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, the fourth day of March, instant, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon for correcting that error, what of right and according to the law and custom of the State of New Jersey, ought to be done.

2 Witness, our Chancellor and President Judge of our said Court of Errors and Appeals, at Trenton, aforesaid, the 26th day of February, nineteen hundred and thirteen.

DAVID S. CRATER, *Clerk.*

EDWARDS & SMITH,
Attorneys of Prosecutor, Plaintiff-in-Error.

Return.

(Filed March 3, 1913.)

The answer of the Justices of the Supreme Court of the State of New Jersey within named.—The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said State, in a certain schedule to this writ annexed, as within we are commanded.

[SEAL.] WM. S. GUMMERE,
Chief Justice.

3 *Writ of Certiorari.*

(Filed May 4, 1912.)

NEW JERSEY, *ss:*

[SEAL.]

State of New Jersey to James Butler, Judge of the First Criminal Court of Jersey City, Greeting:

We being willing for certain reasons to be certified of and concerning a certain accusation in writing, plea, trial and judgment of conviction and order lately made, pleaded and had before and by you against Frank Mihm, on the complaint of David Noble, Lieutenant of Police of Jersey City, for assault and battery as is said, do command you that the said accusation in writing, plea, trial, judgment of conviction and order aforesaid, with all things touching and concerning the same, together with this writ, by whatever name the defendant aforesaid may be called in the said proceedings, you do distinctly and openly send under your hand and seal to our Justices of our Supreme Court of Judicature at Trenton on the fourth day of May, next, that our Justices may cause to be done thereupon what of right and according to the laws of this State should be done.

Witness, William S. Gummere, Esquire, Chief Justice of our Supreme Court at Trenton this 29th day of April, Nineteen hundred and twelve.

WM. RIKER, JR., *Clerk.*

EDWARDS & SMITH,
Attorneys.

4 *Affidavit for Writ.*

(Filed May 4, 1912.)

STATE OF NEW JERSEY,
County of Hudson, ss:

Frank Mihm, of Jersey City, in the County of Hudson and State of New Jersey, of full age, being duly sworn, on his oath de-

poses and says, that he is employed by the Public Service Railway Company as an inspector upon its electric street railway line in Jersey City aforesaid. That on the nineteenth day of April, Nineteen hundred and twelve, he was arrested upon a charge of assault and battery upon the complaint of David Noble, a Lieutenant of Police of Jersey City, and upon the 23rd day of April arraigned, tried, convicted and sentenced upon the said charge before James Butler, Judge of the First Criminal Court of Jersey City. That said arrest was made by the complainant, David Noble, in consequence of the ejection of the said Noble from one of the cars of the Public Service Railway Company at the request of the conductor of the said car addressed to deponent, for refusing to pay the regular fare demanded and received by the Public Service Railway Company for transportation upon its cars. That in so assisting in the ejection of the complainant Noble, deponent was acting under the orders of his employer, the Public Service Railway Company. That the complainant Noble set up on the trial in justification of his refusal to pay fare an act entitled "A Supplement to an Act entitled 'An Act concerning public utilities, to create a Board of Public Utility Commissioners and to prescribe its duties and powers', approved April twenty-first, nineteen hundred and eleven", which said supplement was approved by the Legislature on March 26, 1912, and is known as Chapter 159 of the Laws of 1912. That deponent is advised and believes that the said act is unconstitutional and void as depriving the said Public Service Railway Company of its property without due process of law; that upon the trial before Judge Butler in the First Criminal Court of Jersey City said judge refused to declare said act unconstitutional and found deponent guilty of assault and battery; that there was no contention that deponent used more force than was necessary to eject said Noble. That this affidavit is made for the purpose of procuring a writ of certiorari to review the action of said Court in rendering judgment against deponent.

FRANK MIHM.

Sworn and subscribed to before me this 25th day of April, A. D. 1912.

WILLIAM G. McLOUGHLIN,
Notary Public of New Jersey.

Return.

To the Honorable Chief Justice and Associate Justices of the Supreme Court:

The accusation, plea, trial, judgment and order, whereof mention is within made, I do hereby certify and send under the seal of this Court in the schedule hereto annexed, as within I am commanded.

[SEAL.] JAMES A. BUTLER,
Judge of the First Criminal Court of Jersey City.

6 SCHEDULE.

First Criminal Court of Jersey City.

Before James Butler, Judge.

STATE OF NEW JERSEY
vs.
FRANK MIHM.

On Certiorari.

SCHEDULE.

1912.

April 19. Defendant, Frank Mihm, summarily arrested by David Noble; brought before me.
" 19. Complaint of assault and battery made by David Noble. See copy annexed.
" 19. Defendant paroled in care of counsel.
" 23. Defendant appeared by counsel, William D. Edwards, and waived indictment by Grand Jury; pleaded not guilty and asked for trial before Court.
" 23. Defendant tried. See stenographic notes of trial annexed. David Noble, Daniel Lee and Frank Mihm, witnesses.
" 23. Defendant found guilty of assault and battery.
" 23. Defendant sentenced to pay fine of five dollars.
" 23. Defendant paroled in care of counsel pending appeal on certiorari.

Dated, April 30, 1912.
[SEAL.] JAMES A. BUTLER, *Judge.*

7 *Complaint.*

First Criminal Court of Jersey City.

STATE OF NEW JERSEY
vs.
FRANK MIHM.

Complaint, for Assault and Battery.

CITY OF JERSEY CITY,
County of Hudson,
State of New Jersey, ss:

David Noble, of Jersey City, being duly sworn, complains that on the 19th day of April, A. D., one thousand nine hundred and twelve, at — o'clock — M., or thereabouts, at Jersey City afore-

said, Frank Mihm, of 106 11th St., Hoboken, with force and arms did assault the said Complainant in the peace of the State then and there being and did then and there strike, beat and ill treat the said complainant against the peace of the State.

Wherefore, this complainant prays that the said offender may be dealt with according to the law.

DAVID NOBLE,
Lieut. Police, Complainant.

Subscribed and sworn to before me this 19th day of April, 1912.

[L. S.] EDWARD MARKLEY,
Clerk 1st Criminal Court, Jersey City.

8 *Certificate.*

I, James Butler, Judge of the First Criminal Court of Jersey City, do hereby certify that the testimony annexed to this schedule is a true transcript and copy of the testimony taken before me upon the twenty-third day of April, Nineteen hundred and twelve, in the case of the State upon the complaint of David Noble against Frank Mihm, and the exhibits offered in evidence, on which day the respective parties appeared before me by their counsel, and the said complaint was tried and defendant found guilty and sentenced.

[SEAL.] JAMES A. BUTLER, *Judge.*

9 *Testimony.*

First Criminal Court of Jersey City.

Hon. James Butler, Judge.

THE STATE
vs.
FRANK MIHM.

Assault and Battery.

Trial of the above cause April 23, 1912.

Appearances:

Mr. Thomas G. Haight, for the State.
Mr. W. D. Edwards, for the Defendant.

The complaint is read and the defendant waives indictment or appearance before the Grand Jury, and agrees to be tried before this court.

A waiver is signed.

DAVID NOBLE, called and sworn on behalf of the State, testified as follows:

Direct examination by Mr. Haight:

Q. Sergeant, you are a member of the Police force of Jersey City?
A. Lieutenant of Detectives, Jersey City Police, yes.
10 Q. How long have you been connected with the Jersey City Police force?
A. Fifteen years.
Q. How long have you been a detective?
A. Well, with a little intermission, about nine years.
Q. Your duties require you to do duty as a police officer without uniform?
A. Yes.
Q. Do you have a badge?
A. Yes.
Q. You wear that?
A. Carry it on my person all the time.
Q. Do you recall the morning of April 19, last?
A. Yes.
Q. You are the complainant in this case?
A. Yes.
Q. Will you please state the circumstances? Were you on a car of the Public Service Railway Company on that day?
A. Yes; I got on a Pavonia Avenue line car at Grove Street and Newark Avenue that morning.
Q. Where were you going?
A. Lieutenant Murphy and I were going to 42 Booraem Avenue to interview a woman who had a gold necklace stolen from her.
Q. By whose orders?
A. Captain Lee.
Q. Who is he?
A. Head of the detectives, Captain of Detectives.
Q. You boarded the car at Newark Avenue and——
A. Grove Street.
Q. After you got on the car what happened?
A. The conductor came to us for our fares. We showed him our shields and told him we were police officers going up on the hill. He said that didn't make any difference to him, he wanted our fares. We told him we wouldn't pay, we were riding under the law, had a right to ride. He said he wanted some further proof, and we gave him our cards.
11 Q. What do you mean?
A. He said he didn't know anything about the law. We said we were police officers and showed him our badges; and if there was any further question—"Here is our card."
Q. What do you mean?
A. Our name and address.
Q. The fact that you were detectives?
A. Yes, and we showed him our shields.

Q. Have you a card with you that you gave him?
A. (Producing a card.)

Mr. Haight: I offer the card in evidence. It is marked Exhibit P-1 in evidence.

It reads as follows: David Noble, Detective Sergeant, Jersey City Police. Jersey City, N. J.

Q. Has the title of "Detective Sergeant" since this card was printed, been changed to your present title, "Lieutenant of Detectives"?
A. Yes—"Lieutenant."
Q. After you showed him that card what was done?
A. He didn't bother us any further until we got to the car barns at Summit Avenue.
Q. Then what happened?
A. He walked in and reported and came out and said we would have to get off.
Q. Had you arrived at your destination?
A. No.
Q. What was done then?
A. With telephoning, we waited for about thirty minutes and then an inspector came out and said we would have to get off.
12 Q. That was this defendant?
A. Yes. We told him we would refuse to get off, we were going on our business.
Q. Did you tell him where?
A. Told him we were on police business, we didn't tell him the place where we were going.
Q. What did he do then?
A. He went in and came out again and said we would have to get off. We told him no, we absolutely refused. He said he would have to put us off. We said, "Start in," then he grabbed me by the coat and started to pull me out of the door. As soon as he had put me off the car I placed him under arrest.

Cross-examination by Mr. Edwards:

Q. When requested to get off the car you refused to do so?
A. Yes.
Q. You thought you had the right to ride?
A. Yes.
Q. Under what is known as Chapter 159 of the Laws of 1912?
A. Yes.
Q. You were standing on your rights under that law?
A. Yes.
Q. I suppose no more force was used than was necessary to put you off?
A. No, sir.

13 DANIEL LEE, a witness produced on behalf of the State being sworn, testified as follows:

Direct examination by Mr. Haight:

Q. You are the head of the detective force of Jersey City?
A. Yes.
Q. You were such on the 19th of April last?
A. Yes.
Q. Do you know Lieutenant Noble, who was the last witness on the stand?
A. Yes.
Q. Is he connected with the police force of Jersey City?
A. Yes.
Q. In what capacity?
A. Plain clothes lieutenant.
Q. His duties as detective lieutenant require him to do duty without uniform?
A. Yes, they do.
Q. Do you recall on the 19th of April sending him to do any police duty?
A. Yes, I did.
Q. State what it was?
A. I sent him and Officer Murphy up to investigate a robbery at the address he has testified to.
Q. Where is Sergeant Noble located?
A. He is assigned to this precinct, here, now.
Q. At that time——?
A. He was assigned to this precinct.
Q. That is the Third Precinct?
A. Yes.
Q. How far was it from the City Hall, where you assigned him to this duty, up to the place where he was to be?
A. About a mile and a half or two miles.
Q. The most convenient way to go there is by trolley car?
A. Yes.

14 Q. Is it the custom of the police department to have plain clothes detectives from time to time on the trolley cars?
A. Yes.
Q. State the reasons you have them there?
A. We have them there at all times going back and forth.
Q. Do you have them there for any specific purpose?
A. Yes, to see if there are any pickpockets on the car——
Q. Any other reasons?
A. And any other trouble that may arise while they are on the car. If they see a violation of the law they will make an arrest.
Q. Do you have them circulating on the cars at all times?
A. We do, on all the different lines in the city.
Q. For the purpose of detecting pickpockets and preserving the laws?
A. Yes.

Q. How long have you been a member of the police force of Jersey City?

A. Twenty-four years.

Q. To your knowledge have the police, or have they not, been carried free by the trolley companies operating in Jersey City during that period?

A. I can't say twenty-four years, I can go back sixteen years.

Q. What do you mean that you can't go back further,—your recollection?

A. I was not lieutenant then, at least I was not a detective.

Q. Can't you recall whether you were carried then or not?

A. I could testify that for over twenty odd years they have not paid fares. I never knew them to pay fares,—detectives.

Q. When was the rule put into effect, they were to pay fares?

A. July, 1910, under the Utility Law.

15 (It is stipulated by Counsel that on July 4, 1910, the first public utilities law went into effect purporting to bar the issuance of passes, that after that time no tickets were issued to the detectives by the company, which entitled them to free rides.)

Q. How many detectives have you?

A. Twenty-three.

Q. Do you know whether the Public Service Railway Company is now carrying the uniformed police while in uniform, free of charge?

Mr. Edwards: I object on the ground that *is* is immaterial.

Mr. Haight: It may become very material in the question of construing the law.

The Court: I will allow the question.

A. Yes.

Cross-examination by Mr. Edwards:

Q. Prior to July, 1910, the detectives were furnished with books?

A. Yes, pass books.

Q. As each trip was taken——

A. They tore off a ticket.

Redirect examination by Mr. Haight:

Q. Did you give the detectives orders before or on the 19th of April to refuse to pay fares?

A. The Chief of Police did.

Mr. Edwards: We offer in evidence the certificate of the in-
16 corporation of the Public Service Railway Company, dated August 20, 1907, under which certificate, on the twentieth day of August, 1907, the Public Service Railway Company entered into the possession and operation of street railway lines in Jersey City, which street railway lines had been operated by other companies for many years previous thereto.

Mr. Edwards: We have no testimony to offer. We ask for the discharge of the defendant on the ground that the detective had no right to ride on the car without paying his fare. It is admitted that he was in the performance of police duty, but notwithstanding, he was not entitled to ride. The complainant says that he was entitled to ride under the provisions of Chapter 159 of the laws of 1912, but we insist that that law is unconstitutional, on the ground that it deprives the railway company of its property without due process of law. While we do not intend to make any extended argument on the subject we would call your attention to the case of Wilson vs. United Traction Company, 3 Appellate Division of the State of New York, as it is reported in 76 N. Y. Supp. Reports, 203; 72 Appellate Division, 233. Of course we know it is rather an extraordinary thing to ask a police justice to pass upon the constitutionality of the law, but we make
17 the point, and if your Honor refuses to recognize the point it will be our duty to carry the matter up.

The Court: I would feel that I had no right to question the law, nor to follow that decision. I have got to take judicial notice of the laws passed by the last Legislature which gives to the complainant in this case the privilege of riding free on the cars of the company while engaged in the performance of his duty. It appears that while so attempting to ride on this car the defendant, one of the men of the Public Service Railway Company, used force upon the body of the complainant to put him off the car. I find the defendant guilty of assault and battery and I will fine him five dollars.

Mr. Edwards: We intend to carry the case up.

18 *Decision of Justice Swayze.*

New Jersey Supreme Court.

STATE OF NEW JERSEY
vs.
FRANK MIHM, Prosecutor.

Before Swayze, J.

Pursuant to the statute.
Certiorari of conviction before a magistrate.
William D. Edwards (Edwards & Smith) for the prosecutor.
Thomas G. Haight (Warren Dixon on the brief) for the State.

SWAYZE, *J.:*

The prosecutor was convicted of assault and battery upon a detective, a member of the police force of Jersey City, and justified upon the ground that the detective was lawfully ejected by the prosecutor acting as servant of the Public Service Railway Company for refusal to pay fare. This defense was met by the act of 1912 (P. L. 235) requiring street railways to grant free transporta-

tion of uniformed public officers while engaged in the performance of their public duties and of detectives whose duties require police duty to be performed without uniform. No question is made that the detective was a public officer and came within the provisions of the act. Its constitutional validity is questioned because it is said to take the railroad company's property without compensation. No other point was argued. Wilson vs. United Traction Co., 76 N. Y. Supp., 203, is a clear authority in favor of this contention. The State relies upon the decision of the Supreme Court of the
19 United States in Interstate Consolidated Street Railway Co. vs. Massachusetts, 207 U. S., 79. That case, however, involved the question of the right to require the transportation of school children at less than cost,—half-fare,—and not the question of the right to require free transportation. The act now in question requires the free transportation of all public officers in uniform. It is not limited to members of the police force. But as the present case involves only the class last named, and so far as appears no other class of public officers will ever claim its privileges to the injury of the company, consideration of the constitutionality of the act ought to be limited to the exact case presented. Tyler vs. Judges of the Court of Registration, 179 U. S., 405. Smiley vs. Kansas, 196 U. S., 447. Grenada Lumber Co. vs. Mississippi, 217 U. S., 433. Citizens National Bank vs. Kentucky, 217 U. S., 443.

All I need decide is whether the requirement of free transportation for members of the police force is within the power of the legislature.

I ought to sustain the legislation if I can consistently with the constitutional provisions. Attorney General vs. McGuinness, 49 Vroom, 346. Three considerations lead me to think that I can, notwithstanding the decision by the Appellate Division in New York.

1. It is not strictly accurate to say that the company receives no compensation for carrying police officers if they pay no fare. It may well be that there is an indirect compensation in the protection afforded by the mere presence of the officer, against pickpockets, or even against assaults on passengers by the company's own servants for which the company would be liable (Haver vs.
20 Central Railroad Company, 33 Vr., 282), and in the help thus given to the company in the performance of its duty to its passengers. Indirect compensation of this character has been recognized as compensation within the meaning of the Constitution. Valentine vs. Englewood, 47 Vr., 509, 518, which cites with approval the remark of Justice Devens in Miller vs. Horton, 152 Mass., 540.

2. The statute of 1912 may fairly be regarded as an exercise of the police power of the State. Policemen are frequently required to be on street cars in the execution of their duties to preserve the peace, to enforce ordinances and to prevent or detect crime. It would be difficult to say that the mere presence of a police officer might not be of value for securing these objects, and it would be

difficult if not impossible to distinguish in principle between his right, for example, to be on a crowded car to arrest pickpockets and his right to be on a car not crowded to enforce the ordinance against spitting. If he has the right to be there for these purposes it is impossible to say that his services may not at any time be required to prevent violations of law; at any rate, the legislature might reasonably think so, and legalize his presence on the car without payment of fare.

3. The constitutionality of legislation is not always to be tested by abstract reasoning. It depends in part at least upon the habits and customs of the community. The Mill Acts, authorizing dams by which the land of other owners are flowed (Head vs. Amoskeag Mfg. Co., 113 U. S., 9); the acts providing for drainage of swamp lands, at the expense in part of unwilling owners, (Wurtz vs. Hoagland, 114 U. S., 607); the taking of land for a levee in Louisiana (Eldridge vs. Trezevant, 160
21 U. S., 452); the irrigation of arid land (Fallbrook Irrigation District vs. Bradley, 164 U. S., 112; Clark vs. Nash, 198 U. S., 361); the construction of an aerial bucket line across another man's land (Strickley vs. Highland Boy Mining Co., 200 U. S., 527) are all instances of the extent to which the right of property may be modified by local customs or local needs, and justify the language of the United States Supreme Court in Otis Co. vs. Ludlow Co., 201 U. S., 140, at page 154, that "even the incidents of ownership may be cut down by the peculiar laws and usages of a State." It is shown in this case that at the time of the incorporation of the defendant company and for many years prior thereto, and subsequently until the Public Utilities Act of 1910 (P. L. 56) was supposed to make the practice illegal, it had been the custom of the street railway companies to carry members of the police force free. The defendant company acquired its rights while that custom was in vogue, and if the custom is now given the force of statutory law, the company loses nothing which it had either in possession or immediate anticipation at the time of its incorporation. In that respect, the case resembles Interstate Consolidated Street Railway Co. vs. Massachusetts, in which, however, the requirement of a half-fare rested upon an antecedent statute. The underlying principle, however, is the same. It was upon this ground that the majority of the court decided that case. Upon it I may rest my view that the act of 1912 as far as it applies to police officers is valid. Further than that I need not go in this case. Assuming what was not questioned that they are public officers within the meaning of the act, the defendant had no right to eject the detective and the judgment must be affirmed.

22 *Judgment.*

(Entered November 13, 1912.)

New Jersey Supreme Court.

STATE OF NEW JERSEY, Defendant-in-Certiorari,
vs.
FRANK MIHM, Prosecutor.

Rule for Judgment.

The writ of certiorari in the above entitled matter having been argued before the Honorable Francis J. Swayze, one of the Justices of the New Jersey Supreme Court, pursuant to the statute in such case made and provided, by William D. Edwards, of counsel for Frank Mihm, prosecutor, and Thomas G. Haight, of counsel for the State of New Jersey; and the Court having considered the reasons and evidence and arguments of counsel;

It is Ordered that the conviction of the said Frank Mihm by the First Criminal Court of the City of Jersey City and the judgment of the said Court in said matter be affirmed, with costs.

Entered November 13, 1912.

On motion of

THOMAS G. HAIGHT, *Attorney.*

23 *Assignment of Errors.*

(Filed April 7th, 1913.)

New Jersey Court of Errors and Appeals.

In Error.

STATE OF NEW JERSEY, Defendant-in-Certiorari, Defendant-in-Error,
vs.
FRANK MIHM, Prosecutor, Plaintiff-in-Error.

Assignment of Error-.

Now, at this day, plaintiff-in-error assigns the following causes of error:

1. Because the Supreme Court decided upon the evidence taken on the trial in the Court below, and returned under the writ of certiorari, that the plaintiff-in-error at the time of committing the alleged assault and battery on David Noble, was not rightfully engaged in ejecting the said Noble from a street railway car of the Public Service Railway Company, a common carrier of passengers in Jersey City (whereof said prosecutor was an employee on said

car) when said Noble had refused to pay the fare fixed by law for his journey on said car, and that in so ejecting said Noble the prosecutor used more force than was necessary.

2. Because the Supreme Court decided that Chapter 159 of the Laws of the State of New Jersey for the year nineteen hundred and twelve (P. L. 1912, page 235) under which said Noble claimed the right to ride free and without payment of fare upon said car of the Public Service Railway Company, is not unconstitutional nor contrary to the fourteenth amendment of the constitution of
24 the United States, and that it does not deprive the said Public Service Railway Company of its property without due process of law.

3. Because the Supreme Court decided that Chapter 159 of the Laws of 1912, is not unconstitutional or void, and that it does not attempt to take the property of the Public Service Railway Company for public use without just compensation and in violation of the constitution of the State of New Jersey.

4. Because the Supreme Court decided that Chapter 159 of the Laws of 1912, is valid and a legitimate use of the police power of the State to provide for public safety.

5. Because the Supreme Court decided that the trial court on the trial below did not err in sustaining against the contention of the plaintiff-in-error, said Chapter 159 of the laws of 1912 as valid and constitutional and did not err in sustaining for that reason the right of said David Noble to ride free upon said car without the payment of fare.

6. Because the Supreme Court decided that the trial judge did not err on the trial below in sustaining against the contention of plaintiff-in-error said Chapter 159 of the laws of 1912, as valid and constitutional and did not err in deciding for that reason that the prosecutor was not justified in ejecting said David Noble from said car, and that in so ejecting him the prosecutor was guilty of an assault and battery.

7. Because the Supreme Court decided that the conviction below was not contrary to the evidence produced on the trial nor contrary to law.

EDWARDS & SMITH,
Attorneys of Prosecutor, Plaintiff-in-Error.

Dated, March, 1913.

25 STATE OF NEW JERSEY:

Court of Errors and Appeals, March Term, 1915.

Error to Supreme Court.

STATE OF NEW JERSEY
and
FRANK MIHM.

Appeal from — Court.

No. 3 of Nov. Term, 1914.
Date, June, 1915.
Chancellor presiding.
Opinion by Garrison, J.

Check List.

	Affirmed.	Reversal.	M.
The Chancellor	1	..	..
" Chief Justice	1	..	..
Mr. Justice Garrison	1	..	..
" " Trenchard	1	..	..
" " Parker	1	..	..
" " Bergen	1	..	..
" " Minturn	1	..	..
" " Kalisch	1	..	..
" " Black	1	..	..
Judge Vredenburgh	1	..	..
" White	1	..	..
" Terhune	1	..	..
" Williams	1	..	..
	—	—	—
Totals	—	..	..

Filed Jun- 14, 1915. Thomas F. Martin, Clerk.

26 New Jersey Court of Errors and Appeals, No. 3, November Term, 1914.

STATE OF NEW JERSEY, Defendant in Error,
v.
FRANK MIHM, Plaintiff in Error.

Argued November 17, 1914. Decided June 14, 1915.

On error to the Supreme Court.

For the Plaintiff in Error, William D. Edwards, Frank Bergen.

For the Defendant in Error, John Bentley, John Milton, John W. Wescott, Attorney-General; Herbert Boggs, Assistant Attorney-General.

PER CURIAM:

The judgment of the Supreme Court is affirmed upon the opinion filed in the case of State v. Sutton.

Endorsed: "Filed Jun- 14, 1915. Thomas F. Martin, Clerk."

27 New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, Defendant in Certiorari, Defendant in Error,
vs.
FRANK MIHM, Prosecutor, Plaintiff-in-Error.

On Certiorari.

Rule of Affirmance.

This cause having been argued at the November term nineteen hundred and fourteen of this court, by Frank Bergen and William D. Edwards for the Plaintiff in error, and John Bentley, John Milton, John W. Wescott, attorney general, and Herbert Boggs, assistant attorney general, for the defendant in error, and the court having inspected the record and judgment below, and the assignments of error filed herein, and having considered the same, and being of the opinion that the judgment of the supreme court should in all things be affirmed,

It is, thereupon, on this first day of July, nineteen hundred and fifteen, on motion of Herbert Boggs, assistant attorney general, ordered that the judgment of the supreme court entered in this cause and brought up by the writ of error herein, be and the same is in all things affirmed, with costs, and the record and proceedings be remitted to the said supreme court to be proceeded with in accordance with this judgment and the practice of that court.

On motion of

HERBERT BOGGS,
Assistant Attorney General.

Filed Jul- 1, 1915. Thomas F. Martin, Clerk.

28 [Endorsed:] 2593. New Jersey Court of Errors and Appeals. State of New Jersey, Defendant in Certiorari, Defendant in Error, vs. Frank Mihm, Prosecutor, Plaintiff in Error. On Certiorari. Rule of Affirmance.

29 New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, Defendant in Certiorari, Defendant in Error,
vs.
FRANK MIHM, Prosecutor, Plaintiff-in-Error.

On Certiorari.

Petition for a Writ of Error to United States Supreme Court.

To the Honorable Edwin Robert Walker, Chancellor and Presiding Judge of the Court of Errors and Appeals of the State of New Jersey:

The petition of Frank Mihm, prosecutor and plaintiff in error in the above entitled cause, respectfully represents that he is a citizen of the United States and of the state of New Jersey; that at the present June term of this court final judgment was rendered in the above stated cause wherein your petitioner, Frank Mihm, was prosecutor and plaintiff in error, and the State of New Jersey was defendant in certiorari and defendant in error in the New Jersey court of errors and appeals, which court is the court of last resort in all cases and the highest court of law and equity in the state of New Jersey in which a decision could be had.

That said action was upon a writ of certiorari issued by the supreme court of New Jersey to the judge of the First Criminal Court of Jersey City to review the legality of a certain order or judgment made and entered by the said First Criminal Court of Jersey City on the twenty-third day of April, nineteen hundred and twelve,
30 concerning a certain accusation in writing against your petitioner, on the complaint of one David Noble, Lieutenant of Police of said city of Jersey City, for assault and battery, in which said action your petitioner was convicted and fined; and that upon the hearing in said suit the supreme court of New Jersey affirmed the said order of conviction of the said First Criminal Court of Jersey City, whereupon your petitioner took a writ of error from said judgment of said supreme court to the court of errors and appeals, and the matter coming on to be heard before that court the judgment of the said supreme court was in all things affirmed.

And your petitioner further shows that he is a conductor of a street railway car of Public Service Railway Company, and employed by that company, and is required by said company in his said service to collect a lawful fare from each person who rides upon said car; that your petitioner made such requirement of said David Noble, who was riding upon the car of which your petitioner was conductor, and when said David Noble refused to pay such fare your petitioner, as he was required to do, ejected said David Noble from said car, using no more force than was required so to do, for which ejection he was convicted as for an assault and battery in the case under review in and by the said judgment of the said First Crimi-

nal Court of Jersey City, which sustained as valid and constitutional chapter 159 of the laws of New Jersey of nineteen hundred and twelve and sustained for that reason the right of the said David Noble to ride free on the car of Public Service Railway Company, deprived Public Service Railway Company of its property without due process of law, denied it the equal protection of the laws, failed to give
31 it the equal protection of the laws and took its property for public use without just compensation.

That your petitioner urged in said supreme court and in said court of errors and appeals that all of said matters and things were secured to your petitioner under and by virtue of section I of the fourteenth amendment of the constitution of the United States; and that the judgment of said supreme court and the said judgment of the court of errors and appeals was and is in violation of the constitution of the United States, and particularly of the aforesaid provision thereof.

The said New Jersey court of errors and appeals, being the highest court in which such judgment could be rendered in the state of New Jersey, and having decided that the said order or judgment of said First Criminal Court of Jersey City made and entered on the said twenty-third day of April, nineteen hundred and twelve, was valid and effectual in law, and having decided that your petitioner was not entitled to the right claimed in and by virtue of the provision of the constitution of the United States hereinbefore referred to, your petitioner alleges that he is aggrieved in that in the proceedings aforesaid said courts have denied to him the right to which he is entitled as a citizen of the United States, all of which will more fully and particularly appear in detail in the record presented herein.

Your petitioner therefore prays that a writ of error may issue from the supreme court of the United States, directed to the New Jersey court of errors and appeals, removing the judgments and proceedings aforesaid that there may be done what according
32 to the constitution of the United States and the laws of the land ought to be done, and that your petitioner may have such other relief as may be proper.

And your petitioner will ever pray, &c.

FRANK BERGEN,
Attorney for and of Counsel with
Prosecutor and Plaintiff in Error.

33 [Endorsed:] 2593. New Jersey Court of Errors and Appeals. State of New Jersey, Defendant-in-Certiorari, Defendant in Error, vs. Frank Mihm, Prosecutor, Plaintiff in Error. On Writ of Error. Petition. Frank Bergen, Attorney for Prosecutor and Plaintiff-in-Error, 755 Broad St., Newark, New Jersey. Filed Jul- 2, 1915. Thomas F. Martin, Clerk.

34 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Court of Errors and Appeals of the State of New Jersey, Greeting:

[Seal District Court of the United States, District of New Jersey.]

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said court of errors and appeals of the state of New Jersey before you, or some of you, being the highest court of law or equity of the said state in which a decision could be had in the said suit between the State of New Jersey, defendant in certiorari and defendant in error, and Frank Mihm, prosecutor and plaintiff in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said state, on the ground of their being repugnant to the constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption especially set up or claimed under such clause of the said constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said Frank Mihm, as by his complaint appears: We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you,
35 if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the first day of July, in the year of our Lord one thousand nine hundred and fifteen.

GEORGE T. CRANMER,
Clerk of the District Court of the United States for the District of New Jersey,
By CHARLES S. CHEVRIER, *Deputy.*

Allowed by

E. R. WALKER,
Chancellor, Presiding Judge of the Court of Errors and Appeals of New Jersey.

36 [Endorsed:] 2593. Supreme Court of the United States. Frank Mihm, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. On Writ of Error. Writ of Error to the New Jersey Court of Errors and Appeals. Frank Bergen, Attorney for Plaintiff in Error, 755 Broad Street, Newark, New Jersey. Filed Jul- 2, 1915. Thomas F. Martin, Clerk.

37 Know all men by these presents, that we Frank Mihm, of the City of Jersey City, New Jersey, as principal, and Fidelity and Deposit Company of Maryland a corporation of the state of Maryland, as surety, obligors, are held and firmly bound unto the State of New Jersey, as obligee, in the full and just sum of five hundred dollars, lawful money of the United States of America, to be paid to the said obligee, or its certain attorney or assigns, to which payment, well and truly to be made, the said obligors bind themselves and their successors jointly and severally, firmly by these presents.

Sealed with their seals and dated this first day of July in the year of our Lord one thousand nine hundred and fifteen.

Whereas, lately at a session of the New Jersey Court of Errors and Appeals in a suit depending in said court between State of New Jersey, defendant in certiorari-defendant in error, and Frank Mihm, prosecutor-plaintiff in error final judgment was rendered against the said Frank Mihm, and he having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of New Jersey citing and admonishing it to be and appear at a supreme court of the United States at Washington within thirty days from the date thereof:

Now, therefore, the condition of the above obligation is such that if the said Frank Mihm shall prosecute said writ of error to effect, and answer all damages and costs if he fails to make his plea good, then the above obligation to be void; otherwise to remain in full force and effect.

37½ FRANK MIHM. [L. S.]

Sealed and delivered in presence of—
L. D. H. GILMOUR.

FIDELITY AND DEPOSIT CO. OF MD.,
[COR. SEAL.] By NEWTON P. KINSEY,
Attorney-in-fact.
GEORGE W. LAMOREUX,
Agent.

Approved by
E. R. WALKER,
Chancellor, Presiding Judge of the Court of Errors and Appeals of the State of New Jersey.

(Revenue Stamp.)

38 STATE OF NEW JERSEY,
County of Essex, ss:

On this first day of July, Nineteen Hundred and Fifteen before me the subscriber, a Commissioner of Deeds of New Jersey, duly commissioned and sworn, personally came George W. Lamoreux by me duly sworn on his oath — says, that he is the agent of the Fidelity & Deposit Company of Maryland, a corporation of the State of Maryland, and that he resides in the city of Orange, New Jersey; that he knows Newton P. Kinsey attorney in fact of the Fidelity & Deposite Company of Maryland, and he knows *to* the corporate seal of the said Company; that the seal affixed to the foregoing instrument is such corporate seal, and that it was affixed by the said attorney in fact, and the said instrument signed by the said attorney in fact as attorney in fact of the said Company attested by deponent as agent by order of said Company in deponent's presence as the voluntary act and deed of said Company; that the said company has duly complied with all the requirements of Chapter 134 of the Laws of the State of New Jersey of the Year nineteen hundred and two (1902); that the good, available assets of said Company exceed its liabilities, as such liabilities are ascertained in the manner provided in said Chapter; that the Fidelity & Deposit Company of Maryland, is duly incorporated under the Laws of the State of Maryland, and is authorized by the Laws of that State and under its Charter to become surety on bonds and obligations such as are mentioned in said Charter; and also has on deposit with the Superintendent of Insurance of the State of Maryland, good securities worth at least Two Hundred Thousand ($200,000) Dollars, held for security of its obligations and has fully paid up, safely invested and unimpaired capital of Two Million ($2,000,000) Dollars; and said Com-
38½ pany by a duly executed instrument, filed in the Department of Banking and Insurance of the State of New Jersey, has constituted the Commissioner of Banking and Insurance of the State of New Jersey, and his successor in office, its true and lawful Attorney, upon whom all original process in any action or legal proceeding against it may be served, and that the following is a true copy of the portion of the By Law of said Company authorizing the execution of Bonds on behalf of said Company:

"Article VI. Section 3. The President, or any of the Vice-Presidents, shall have power by and with the concurrence of the Secretary or any of the Assistant Secretaries, to appoint any attorney-in-fact or to authorize any person or persons to execute on behalf of the Company, any bonds recognizances, stipulations, undertakings, deeds, releases of mortgages, contracts, and agreements and policies, and to affix the seal of the Company thereto."

GEORGE W. LAMOREUX.

Sworn and Subscribed before me this first day of July, nineteen hundred and Fifteen.

FREDERICK J. FISCHER,
Commissioner of Deeds, New Jersey.

39 Fidelity and Deposit Company of Maryland.

General Offices, Baltimore.

(Incorporated February, 1890.)

Financial Statement, December 31st, 1914.

Assets.

Home Office Building, Charles & Lexington Sts.		$2,375,000.00
Other Real Estate, 214 N. Charles St., etc.		185,137.41
Bonds and Stocks		6,008,060.50
First Mortgage Loans, etc.		229,204.93
Unpaid Premiums, (subsequent to Oct. 1, 1914)		1,331,494.76
Unpaid Premiums, (prior to Oct. 1, 1914)		781,588.55
Bank Deposits for use of Branch Offices		76,840.00
Cash in Banks and Trust Companies		1,257,938.58
Total Assets		12,245,264.73
(Assets deducted according to ruling and regulations of various Insurance Departments, etc.)		
Unpaid Premiums, (prior to Oct. 1, 1914)	$781,588.55	
Net Amount of Special Deposits made under laws of various States, etc.	479,871.98	
		1,261,460.53
Total Assets (on basis of statement to insurance Departments, etc.)		10,983,804.20

Liabilities.

Reserve for Unearned Premiums		$3,388,360.08
Reserve for Claims, Admitted & Unadmitted		2,018,793.72
Reserve for Advance Premiums and Return Premiums		463,067.40
Reserve for Commissions (unpaid Premiums subsequent to Oct. 1, 1914)		199,109.30
Reserve for Premium Taxes, and Expense in Transit		130,000.00
Reserves, Special and Contingent		138,841.80
Reserve for Unpaid Reinsurance Premiums		41,978.03
Capital Stock	$3,000,000.00	
Surplus and Undivided Profits	$2,865,114.40	
Less amount deducted, according to Insurance Department regulations (see above).	1,261,460.53	
Surplus and Undivided Profits (on basis of statement to Insurance Departments, etc.)	1,603,653.87	
		4,603,653.87
		10,983,804.20

40 STATE OF MARYLAND,
City of Baltimore, sct:

I, Roland Benjamin, Treasurer of the Fidelity and Deposit Company of Maryland, do hereby certify that the above is a true statement of the Assets and Liabilities of said Company, as of December 31st, 1914, taken from the books and records of said Company.

ROLAND BENJAMIN,
Ass't Treasurer.

STATE OF MARYLAND,
City of Baltimore, sct:

Subscribed and sworn to, before me, a Notary Public of the State of Maryland, in the City of Baltimore, this 14th day of June, A. D. 1915.

[SEAL.] WM. A. BULLOCK,
Notary Public.

Endorsed: "Filed July 2, 1915. Thomas F. Martin, Clerk."

41 New Jersey Court of Errors and Appeals.

STATE OF NEW JERSEY, Defendant in Certiorari, Defendant in Error,
vs.
FRANK MIHM, Prosecutor, Plaintiff-in-Error.

On Writ of Error.

Assignments of Error.

Now comes the said Frank Mihm, prosecutor and plaintiff in error herein, and respectfully submits and shows to the court that in the record, proceedings, decision and final judgment of the court of errors and appeals of the state of New Jersey in the above entitled cause manifest error has intervened to the great injury and damage of the prosecutor and plaintiff in error, as follows, to wit:

First. The said court erred in affirming the judgment of the supreme court of the state of New Jersey, which had affirmed the judgment of the First Criminal Court of the city of Jersey City rendered on the twenty-third day of April, nineteen hundred and twelve, because the said supreme court decided upon the evidence taken on the trial in the court below, the said First Criminal Court of the city of Jersey City, and returned under the writ of certiorari issued out of the supreme court and brought up to the said supreme court in this case, that the prosecutor and plaintiff in error at the time of committing the alleged assault and battery on one David Noble, was not rightfully engaged in ejecting the said Noble from a street railway car of the Public Service Railway Company, a common carrier of passengers in Jersey City, whereof said prosecutor

and plaintiff in error was an employe on said car, when said
42 Noble had refused to pay the fare fixed by law for his journey on said car, and which fare prosecutor and plaintiff in error was required by his employer to collect or to eject said Noble from the car; which prosecutor and plaintiff in error did, using no unnecessary force; and for so doing he was convicted by the judgment under review.

Second. The said court of errors and appeals of the state of New Jersey erred in not reversing the said judgment of the said supreme court of the state of New Jersey because the said supreme court decided that chapter 159 of the laws of the state of New Jersey for the year nineteen hundred and twelve (pamphlet laws 1912, page 235) under which said Noble claimed the right to ride free and without payment of fare upon said car of Public Service Railway Company is not unconstitutional nor contrary to the fourteenth amendment of the constitution of the United States, and that it does not deprive the said Public Service Railway Company, and its employe the prosecutor and plaintiff in error, of property without due process of law, or for one or more of the causes and reasons and assignments of error filed by the prosecutor and plaintiff in error, and in not sustaining the allegations of error so filed.

Third. The said court of errors and appeals erred in not reversing the said judgment of the said supreme court because the said supreme court decided that chapter 159 of the laws of New Jersey of nineteen hundred and twelve is valid and a legitimate use of the police power of the state to provide for public safety.

Fourth. The said court of errors and appeals erred in not reversing the said judgment of the said supreme court because the said
43 supreme court decided that the trial court below did not err in sustaining against the contention of the plaintiff in error said chapter 159 of the laws of New Jersey of nineteen hundred and twelve as valid and constitutional, and did not err in sustaining for that reason the right of the said David Noble to ride free upon said car without the payment of fare.

Fifth. The said court of errors and appeals erred in not reversing the said judgment of the said supreme court because the said supreme court decided that the trial judge did not err on the trial below in sustaining against the contention of plaintiff in error said chapter 159 of the laws of New Jersey of nineteen hundred and twelve as valid and constitutional, and did not err in deciding for that reason that the prosecutor and plaintiff in error was not justified in the discharge of the duty required of him by Public Service Railway Company in ejecting said David Noble from said car; and that in so ejecting him the prosecutor and plaintiff in error was guilty of an assault and battery.

Sixth. The said court of errors and appeals of New Jersey erred in not holding that the action of the said supreme court, which affirmed the said judgment of the said First Criminal Court of the city of Jersey City, did not under said chapter 159 of the laws of New Jersey of nineteen hundred and twelve unlawfully deprive the

prosecutor and plaintiff in error and his employer, Public Service Railway Company, of property without due process of law.

Seventh. The said court of errors and appeals of New Jersey erred in not holding that the action of the said supreme court, which affirmed the judgment of the said First Criminal Court of the city of Jersey City, did not under said chapter 159 of the laws of
44 New Jersey of nineteen hundred and twelve deny to the prosecutor and plaintiff in error the equal protection of the laws.

Eighth. The said court of errors and appeals of New Jersey erred in not holding that the action of the said supreme court, which affirmed the said judgment of the said First Criminal Court of the city of Jersey City, did not under said chapter 159 of the laws of New Jersey of nineteen hundred and twelve deny to the prosecutor and plaintiff in error the equal benefit of the laws.

Ninth. The said court of errors and appeals of New Jersey erred in not holding that the action of the said supreme court, which affirmed the judgment of the said First Criminal Court of the city of Jersey City, did not under said chapter 159 of the laws of New Jersey of nineteen hundred and twelve have the effect of taking the property of Public Service Railway Company and its employe, the prosecutor and plaintiff in error, for public use without just compensation.

Tenth. The said judgment of the said First Criminal Court of the city of Jersey City, the said judgment of the said supreme court of New Jersey, and the said judgment of the said court of errors and appeals of New Jersey enabled the state of New Jersey under said chapter 159 of the laws of New Jersey of nineteen hundred and twelve to deprive, and do deprive, the prosecutor and plaintiff in error and his employer Public Service Railway Company of property without due process of law, and in violation of section I of the fourteenth amendment of the constitution of the United States.

Eleventh. The said judgment of the said First Criminal Court of the city of Jersey City, the said judgment of the said supreme
45 court of New Jersey, and the said judgment of the said court of errors and appeals of New Jersey, under said chapter 159 of the laws of New Jersey of nineteen hundred and twelve, have the effect of taking, and do in fact take, the property of the prosecutor and plaintiff in error and his employer Public Service Railway Company for public use without just compensation, and in violation of section I of the fourteenth amendment of the constitution of the United States.

Twelfth. The said judgment of the said First Criminal Court of the city of Jersey City, the said judgment of the said supreme court of New Jersey, and the said judgment of the said court of errors and appeals of New Jersey, under said chapter 159 of the laws of New Jersey of nineteen hundred and twelve, deny to the prosecutor and plaintiff in error, who is a citizen of the state of New Jersey and within its jurisdiction, the equal protection of the laws of the state of New Jersey, in violation of section I of the fourteenth amendment of the constitution of the United States.

And the said prosecutor and plaintiff in error prays that the judgments aforesaid may be reversed, annulled and for nothing holden.

FRANK BERGEN,
Attorney for and of Counsel with Prosecutor, and Plaintiff in Error.

46 [Endorsed:] 2593. New Jersey Court of Errors and Appeals. State of New Jersey, Defendant-in-Certiorari, Defendant in Error, vs. Frank Mihm, Prosecutor, Plaintiff in Error. On Writ of Error. Assignments of Error. Frank Bergen, attorney for Prosecutor, and Plaintiff-in-Error, 755 Broad St., Newark, New Jersey.

47 UNITED STATES OF AMERICA, *ss:*

To the State of New Jersey, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the Clerk's Office of the Court of Errors and Appeals of the State of New Jersey, wherein Frank Mihm is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edwin Robert Walker, our Chancellor and Presiding Judge of the Court of Errors and Appeals of the State of New Jersey, this first day of July, in the year of our Lord one thousand nine hundred and fifteen.

E. R. WALKER,
Chancellor, Presiding Judge of the Court of Errors and Appeals of the State of New Jersey.

48 [Endorsed:] 2593. Supreme Court of the United States. Frank Mihm, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. On Writ of Error. Citation. Frank Bergen, Attorney for Plaintiff in Error, 755 Broad Street, Newark, New Jersey.

49 Supreme Court of the United States.

FRANK MIHM, Plaintiff in Error,
vs.
STATE OF NEW JERSEY, Defendant in Error.

On Writ of Error.

Acknowledgment of Service.

Service is hereby acknowledged this second day of July A. D. nineteen hundred and fifteen, of a copy of this citation, writ of error and assignments of error in the above stated cause.

JOHN W. WESCOTT,
Attorney for Defendant in Error.

50 [Endorsed:] Supreme Court of the United States. Frank Mihm, Plaintiff in Error, vs. State of New Jersey, Defendant in Error. On Writ of Error. Acknowledgment of Service. Frank Bergen, Attorney for Plaintiff in Error, 755 Broad Street, Newark, New Jersey.

51 Court of Errors and Appeals of the State of New Jersey.

I, Thomas F. Martin, Clerk of the Court of Errors and Appeals of the State of New Jersey, Do Hereby Certify that there was lodged with me as such Clerk, in the case of Frank Mihm, Plaintiff in Error, vs. State of New Jersey, Defendant in Error, on the Second day of July, A. D. Nineteen hundred and fifteen, the original Bond, of which a copy is herein set forth; two copies of the Writ of Error, as herein set forth, one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of the said Court, at my office in Trenton, New Jersey, this Eighth day of July, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN, *Clerk.*

52 Court of Errors and Appeals of the State of New Jersey.

FRANK MIHM, Plaintiff in Error.
vs.
STATE OF NEW JERSEY, Defendant in Error.

In obedience to the command of the within writ, I herewith transmit to the Supreme Court of the United States, a duly certified transcript of the complete record and proceedings in the within entitled cause, with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the Court of Errors and Appeals, in the City of Trenton, this Eighth day of July, A. D. 1915.

[Seal of the Secretary of the State of New Jersey.]

THOMAS F. MARTIN, *Clerk.*

Endorsed on cover: File No. 24,837. New Jersey Court of Errors and Appeals. Term No. 190. Frank Mihm, plaintiff in error, vs. The State of New Jersey. Filed July 9th, 1915. File No. 24,837.

Office Supreme Court, U. S.
FILED
DEC 13 1916
JAMES D. MAHER
CLERK

Office Supreme Court, U. S.
FILED
[redacted] 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

Nos. 189 and 190.

(Argued together by consent.)

PATRICK SUTTON, *Plaintiff-in-Error,* *vs.* THE STATE OF NEW JERSEY, *Defendant-in-Error.*	*No. 189.* *In Error to the Court of Errors and Appeals of the State of New Jersey.*
FRANK MIHM, *Plaintiff-in-Error,* *vs.* THE STATE OF NEW JERSEY, *Defendant-in-Error.*	*No. 190.* *In Error to the Court of Errors and Appeals of the State of New Jersey.*

Brief for Plaintiffs in Error.

FRANK BERGEN,
Of Counsel.

Arthur W. Cross, Law Printer, 243 Market Street, Newark, N. J.

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Supreme Court of the United States

OCTOBER TERM, 1916.

Nos. 189 and 190.

(Argued together by consent.)

PATRICK SUTTON, *Plaintiff in Error,* *vs.* THE STATE OF NEW JERSEY, *Defendant in Error.*	*No. 189.* *In Error to the Court of Errors and Appeals of the State of New Jersey.*
FRANK MIHM, *Plaintiff in Error,* *vs.* THE STATE OF NEW JERSEY, *Defendant in Error.*	*No. 190.* *In Error to the Court of Errors and Appeals of the State of New Jersey.*

BRIEF FOR PLAINTIFFS IN ERROR.

General Statement of the Case.

The writs of error in these cases bring up two judgments of the court of errors and appeals of New Jersey affirming judgments of the supreme court of that state which held that an act of the legislature of New Jersey, passed in 1912, requiring street railway companies to transport uniformed police officers and detectives without uniform while engaged in the perform-

ance of their duties without payment of fare is constitutional. By consent the cases will be argued together, as they involve the same question.

In the *Sutton case* the facts are these: James Coyle, a detective on the Jersey City force, left his home in plain clothes on the morning of April 20th, 1912, to go to police headquarters, where he had been directed to report. He boarded a car of Public Service Railway Company for that purpose. The conductor demanded his fare. Coyle showed his badge, and refused to pay. The conductor called to his aid Patrick Sutton, an inspector in the employ of the company, who put Coyle off the car for refusing to pay fare, using no more force than necessary. (Trans., p. 7.) Coyle thereupon arrested Sutton for assault and battery and took him before the first criminal court of Jersey City. There a formal complaint was lodged, indictment was waived, plea of not guilty was entered and the case tried before the court.

The facts in the *Mihm case* are these: David Noble, a detective on the police force of Jersey City, was on April 19, 1912, instructed by the chief of the bureau to go with another detective to interview a woman from whom a gold necklace had been stolen. The detectives were not in uniform. Noble boarded a car of the company going toward his destination. The conductor demanded his fare, and Noble showed his official shield and refused to pay. Before the car reached his destination Noble was ejected by

Mihm, an inspector employed by the company. No more force was used than necessary (Trans., p. 7). Noble thereupon arrested Mihm for assault and battery, and the same proceedings were had in the first criminal court as in the Sutton case.

The defence interposed by Sutton and Mihm was that the act of 1912 is not constitutional. The court overruled the defence, held the act to be constitutional, found them both guilty, and fined each five dollars.

The judgments of the criminal court were taken to the supreme court of New Jersey on certiorari for review, and were affirmed. The opinion of the supreme court may be found in the transcript, in the Sutton case, No. 189, at p. 11, and in the Mihm case, No. 190, at p. 10. The judgments entered in the supreme court were subsequently affirmed by the court of errors and appeals (Trans., Sutton case, p. 16, and Mihm case, p. 15).

Assignments of Error.

(Trans., Sutton case, No. 189, p. 25; Trans., Mihm case, No. 190, p. 23.)

The assignments of error relied on are as follows:

(1) The judgments under review deny to the plaintiffs in error and Public Service Railway Company, by which the plaintiffs in error were employed and for which they were acting, the equal protection of the laws of the state of New Jersey.

(2) The said judgments deprive the plaintiffs in error of their liberty, and also deprive them and their employer Public Service Railway Company of their property and of the property of each of them without due process of law.

ARGUMENT.

I.

The statutes of New Jersey relating to free transportation of passengers by street railway companies.

Before taking up for consideration the act of 1912 which undertakes to impose on the company the obligation to carry policemen and detectives free of charge, it will be helpful to examine three statutes *in pari materia* enacted by the legislature of New Jersey in the years 1910 and 1911.

In 1910 an act was passed, entitled "An act to further amend and supplement an act entitled 'An act to create a board of railroad commissioners for the state of New Jersey, and to prescribe its powers and duties,' approved May fifteenth, 1907, by enlarging the powers of said commission and extending its jurisdiction over the other public utilities of the state" (P. L., 1910, p. 56). That statute, which applied to street railway companies, provided in its ninth section that:

> "9. Any public utility, as herein defined, may appeal to said board from any order or regulation made under existing law by any local, municipal or county governing

body, and said board is hereby given jurisdiction to hear said appeal and to determine the matter in question on the merits, and make such order in the premises as may seem just and reasonable; **and no such public utility, as herein defined, shall hereafter give, grant or bestow upon any local, municipal or county official any discrimination, gratuity or free service whatsoever, but nothing herein contained shall prevent the free transportation of uniformed public officers while engaged in the performance of their public duties."**

In the following year (1911) section 9 of the act of 1910 was amended by adding after the words "public duties" the following: **"or police officers of whatever grade or rank acting as detectives, whose duties require police duty to be performed without uniform."** (P. L., 1911, p. 29.) It will be noticed that both of these amendments permitted but did not command transportation companies to carry officers without payment of fare.

In the year 1911, however, *and after the passage of the amendment of that year,* the legislature passed a new act entitled, "An act concerning public utilities; to create a board of public utility commissioners and to prescribe its duties and powers." (P. L., p. 374.)

This second act of 1911 provided in section 18:

"18. No public utility [including street railways] as herein defined shall:

"(a) • • • •

"(d) Make or give, directly or indirectly, any undue or unreasonable preference or advantage to any person or corporation or to any locality or to any particular description of traffic in any respect whatsoever, or subject any particular person or corporation or locality or any particular description of traffic to any prejudice or disadvantage in any respect whatsoever.

• • • •

"(g) Hereafter give, grant or bestow upon **any local, municipal or county official any discrimination, gratuity or free service whatsoever,** but nothing herein contained shall prevent the entry into any public conveyance or in or upon the property of any such public utility as herein defined of any such official in the pursuit of his public duties in connection with the particular conveyance or property so entered by him, upon exhibiting his authority so to do."

This act plainly forbids the free transportation of policemen and detectives. It seems to be entirely clear that it repealed the previous legislation on the same subject. *Roche* v. *Jersey City*, 40 N. J. L., 257; *Haynes* v. *Cape May*, 52 N. J. L., 180; *Camden* v. *Varney*, 63 N. J. L., 325, 329. It has been held repeatedly that policemen and detectives are officers, and consequently are within

the scope of that act. *Dempsey* v. *N. Y. Central & Harlem River R. R. Co.*, 146 N. Y., 290, 40 N. E. 867; *Woodhull* v. *City of New York*, 150 N. Y., 450, 44 N. E., 1038; *Brown* v. *Russell*, 166 Mass., 14, 43 N. E., 1005.

In the following year (1912) the statute in question was enacted (P. L., p. 235):

> "A supplement to an act entitled 'An act concerning public utilities, to create a board of public utility commissioners and to prescribe its duties and powers,' approved April twenty-first, nineteen hundred and eleven.
>
> "BE IT ENACTED by the Senate and General Assembly of the State of New Jersey:
>
> "1. On and after the passage of this act each street railway company or corporation referred to in the act to which this act is a supplement shall grant free transportation of uniformed public officers while engaged in the performance of their public duties, or police officers of whatever grade or rank acting as detectives, county detectives, or detectives attached to or connected with the office of the prosecutor of the pleas in any county in this state while engaged in the performance of their public duties, whose duties require police duty to be performed without uniform.
>
> "2. This act shall take effect immediately.
> "Approved March 26, 1912."

The power of the state to enforce this mandatory statute against the plaintiffs in error and

their employer Public Service Railway Company, is the question in this case.

The substance of the legislation referred to which is pertinent to the present discussion is this:

Prior to the passage of the second act of 1911 (*supra*, p. 5) no gratuity or free transportation by street railway companies was lawful, except that such companies were permitted (not required) by the act of 1910, as amended by the first act of 1911, to carry uniformed police officers while engaged in the performance of their public duties, and police officers acting as detectives not in uniform. **The second act of 1911, however, prohibited all gratuities by street railway companies, and rendered it unlawful for such companies to carry police officers or detectives, whether in uniform or not.** *Public Service Ry. Co.* v. *Public Utility Board*, 85 N. J. L., 123; affirmed 86 N. J. L., 696. The act of 1912 attempted, for the first time, to compel street railway companies to carry policemen and detectives free of charge.

II.

It is beyond the power of the legislature of New Jersey to compel street railway companies to carry individuals or classes of passengers without payment of fare.

The Public Service Railway Company being of opinion that the act of 1912 is unconstitutional, refused to carry detectives free; whereupon in

April of that year, the police department of Jersey City ordered the detectives to refuse to pay fare, and these suits were the consequence.

The case of *Wilson* v. *United Traction Co.*, 76 N. Y. Supp., 203, decided by the appellate division of the supreme court of New York, third department, in 1902, is an authority directly in point. The report of that case shows that an act had been passed authorizing the mayor of a city or incorporated village to issue a certificate to policemen, which should entitle them to ride on street railways therein while in the performance of their duties. The court held the act to be unconstitutional because its effect was to deprive the railway company of its property without due process of law. The following is the opinion in that case in full:

> "The decision in the *Beardsley case*, 162 N. Y., 230, 56 N. E., 488, which follows the decision of the federal court in *Railroad Co.* v. *Smith*, 173 U. S., 684, 19 Sup. Ct., 565, 43 L. Ed., 858, seems to be a clear authority for the proposition that the statute of 1895, above referred to, **operates to deprive the defendant of its property without due process of law.** In those cases the railroad companies were required to issue mileage books, at a reduced rate of fare, to those willing to purchase a designated number of miles at one time. In this case the defendant is required to carry a certain specified class of persons entirely free of charge. If the former is an invasion of the companies' property rights, the latter is equally so; and in

neither case is there any process of law provided for, save the mandate contained in the act itself. It is sufficient to refer to the reasoning of the court in those two cases to show that the principles which controlled in them are equally applicable to this case. They are substantially alike in all respects, save as to the single question whether the act of 1895 can be sustained **as a legitimate exercise of the so-called police power of the state.** If it may not be sustained upon that theory, then, like the mileage-book law, it is a clear violation of that provision of the constitution that no person shall be deprived of 'life, liberty or property without due process of law, nor shall private property be taken for public use without just compensation.' There are certain lines of legislation which are sustained although they do injuriously interfere with property rights, and even confiscate them, without due process of law; but it is for the reason that they are necessary to promote the health, morals, or safety of the public. Just how far such legislation may extend, it is not easy to define in any general statement. The methods which the legislature may adopt to guard such interests, the courts do not attempt to regulate, except as the cases arise and are presented to them; but in such cases they are **'careful to detect violations of constitutional safeguards masquerading in the garb of police powers.'** An extended discussion of those powers and their extent is not neces-

sary here. One may be found in the case of *Bronk* v. *Barckley,* 13 App. Div., 72; 43 N. Y. Supp., 400. It is sufficient to say that, in our judgment, the statute in question cannot be sustained as a valid exercise of that power. Its evident purpose and effect is to relieve the municipalities referred to therein from a portion of the burden of maintaining their police and fire departments at the expense of the several street railway companies within their limits. Concede that the public safety requires that the public officers mentioned be carried upon such railroads, it is not apparent why, in order to promote that safety, they should be carried free of charge. There is no pretense that the act is necessary to secure their right to ride upon such roads. The sole purpose is to secure their right to ride free. Thus the only advantage secured by the act to the public is that the railroad company, instead of the municipality, pays the fare. Such an advantage may be a public convenience; but the right to take the property of the individual citizen, or of a class, for the sole reason that the proceeds of it would be convenient to aid the municipality in defraying its general expenses, has not yet been conceded as a legitimate exercise of the police power, and we are not disposed to concede it now.

"This conclusion renders it unnecessary to examine the other questions raised in this case. The statute being a violation of the constitutional protection above referred to,

it is inoperative as against the defendant. The plaintiff's claim to ride free was therefore without warrant, and judgment should therefore be rendered against him, and in favor of the defendant, for costs. All concur."

The supreme court of Kansas, in *Ex Parte Gardner,* 84 Kan., 264; 113 Pac., 1054; 33 L. R. A. (N. S.), 956, in passing upon an act of the legislature of the state of Kansas requiring officers and men of the Kansas national guard to be carried at the rate of one cent a mile, held that provision to be invalid. It said, among other things:

> "It can scarcely be claimed, however, that the national guard is maintained because of anything occasioned by the existence or operation of railroads in the state, or that the railroads derive any benefit from the existence of the national guard which is not shared by every other person in the state. The presence in the state of this body of men is beneficial to the railroads just as the government of the state, the various municipal governments, the courts, and the whole body of public functionaries are beneficial to them, and in no other way. **The equal protection of the laws requires, not only that all persons brought within the influence of a statute shall be treated alike, but that a classifying statute must bring within the equal influence of its provisions all persons who are under the same conditions."** (113 Pac., p. 1057.)

In many other cases statutes requiring the issuance of free transportation to certain classes of people have been held unconstitutional. The following are examples:

A statute requiring railroad companies to furnish free transportation to shippers of stock was held to be a deprivation of property without due process of law and a denial of the equal protection of the laws and therefore unconstitutional and void under the fourteenth amendment. *Atchison &c. Ry.* v. *Campbell,* 61 Kansas, 439; 59 Pac., 1051; 48 L. R. A., 250.

A statute requiring railroad companies to furnish free return transportation to shippers of stock by car load over the line of their road or roads to the point from which shipment is made, was held invalid as a deprivation of property of the carrier without due process of law, in violation of the fourteenth amendment, in *McCully* v. *Chic. B. & Q. Ry. Co.,* 212 Mo., 1; 110 S. W., 711.

In *George* v. *Chic. R. I. & P. Ry. Co.,* 214 Mo., 551, 113 S. W., 1099, it was held that a statute which required railroad companies to furnish free return transportation to shippers of stock by car load over their lines to the point from which shipment was made is invalid because it denied to carriers the equal protection of the laws.

Statutes requiring the issuance of mileage tickets, at less than standard rates, have also been held unconstitutional for the reason that their effect is to take the property of railroad companies without due process of law.

The case of *Lake Shore & M. S. Ry. Co.* v. *Smith*, 173 U. S., 684, is the leading authority on this subject. It appeared that a Michigan statute required thousand-mile tickets to be sold by railroad companies for less than the ordinary rates of fare, for use by the purchaser and his wife and children, if named on the ticket, and making them valid for two years after date of purchase. This was held to be a violation of the constitutional rights of the railroad companies to due process of law and the equal protection of the laws. The reasoning of the opinion in that case is very pertinent to the question involved in the present case as will be seen by the following quotation:

> "It is stated upon the part of the defendant in error that the act is a mere regulation of the public business, which the legislature has a right to regulate, and its apparent object is to promote the convenience of persons having occasion to travel on railroads and to reduce for them the cost of transportation; that its benefit to the public who are compelled to patronize railroads is unquestioned; that it brings the reduction of rates of two cents per mile within the reach of all persons who may have occasion to make only infrequent trips; and that there is no reason why the legislature may not fix the period of time within which the holder of the ticket shall be compelled to use it. The reduction of rates in favor of those purchasing this kind of ticket is thus justified by the reasons stated.

"The right to claim from the company transportation at reduced rates by purchasing a certain amount of tickets is classed as a convenience. As so defined it would be more convenient if the right could be claimed without any compensation whatever. But such a right is not a convenience at all within the meaning of the term as used in relation to the subject of furnishing conveniences to the public. And also the convenience which the legislature is to protect is not the convenience of a small portion only of the persons who may travel on the road, while refusing such alleged convenience to all others, nor is the right to obtain tickets for less than the general and otherwise lawful rate to be properly described as a convenience. If that were true, the granting of the right to some portion of the public to ride free on all trains and at all times, might be so described. What is covered by the word 'convenience,' might be difficult to define for all cases, but we think it does not cover this case. An opportunity to purchase a thousand-mile ticket for less than the standard rate we think is improperly described as a convenience.

"**The power of the legislature to enact general laws regarding a company and its affairs does not include the power to compel it to make an exception in favor of some particular class in the community and to carry the members of that class at a less sum than it has the right to charge for those who are**

not fortunate enough to be members thereof. This is not reasonable regulation. We do not deny the right of the legislature to make all proper rules and regulations for the general conduct of the affairs of the company, relating to the running of trains, the keeping of ticket offices open and providing for the proper accommodation of the public.

* * * * * * *

"If the legislature can interfere by directing the sale of tickets at less than the generally established rate, it can compel the company to carry certain persons or classes free. If the maximum rates are too high in the judgment of the legislature, it may lower them, provided they do not make them unreasonably low as that term is understood in the law; but it cannot enact a law making maximum rates, and then proceed to make exceptions to it in favor of such persons or classes as in the legislative judgment or caprice may seem proper. What right has the legislature to take from the company the compensation it would otherwise receive for the use of its property in transporting an individual or classes of persons over its road, and compel it to transport them free or for a less sum than is provided for by the general law? Does not such an act, if enforced, take the property of the company without due process of law? We are convinced that the legislature cannot thus interfere with the conduct of the affairs of corporations.

"But it may be said that as the legislature would have the power to reduce the maximum charges for all, to the same rate at which it provides for the purchase of the thousand-mile ticket, the company cannot be harmed or its property taken without due process of law when the legislature only reduces the rates in favor of a few instead of in favor of all. It does not appear that the legislature would have any right to make such an alteration. To do so might involve a reduction of rates to a point insufficient for the earning of the amount of remuneration to which a company is legally entitled under the decisions of this court. In that case reduction would be illegal. For the purpose of upholding this discriminatory legislation we are not to assume that the exercise of the power of the legislature to make in this instance a reduction of rates as to all would be legal, and therefore a partial reduction must be also legal. *Prima facie*, the maximum rates as fixed by the legislature are reasonable. This of course applies to rates actually fixed by that body."

Similar decisions were rendered in the following cases: *Beardsley* v. *N. Y., L. E. & W. R. R. Co.*, 162 N. Y., 230; 56 N. E., 488; *Commonwealth* v. *Atl. Coast Line R. R. Co.*, 106 Va. 61; 55 S. E., 572; 7 L. R. A., (N. S.) 1086; *State* v. *Gt. Northern Ry. Co.*, 116 N. W. (N. Dakota), 89.

The general rule is stated in Elliott on Railroads, section 672:

> "It is quite clear that the legislature cannot compel a railroad company to render services without compensation. This is decided in the railroad commission cases and other cases referred to in the preceding section. The conclusion we affirm rests on elementary principles of constitutional law, and is strongly fortified by decisions of analogous cases. So it has been held that a statute requiring railroad companies to furnish free transportation to shippers of live stock, without any compensation therefor, is void as a deprivation of property without due process of law, and as a denial of the equal protection of the laws. Under the form of regulating the compensation for transporting freight and passengers the legislature cannot compel a railroad corporation to carry freight and passengers unless compensation is adequately provided. In our opinion the legislature has no power to require a railroad company to carry freight or passengers without compensation in money and cannot substitute for money property or claims against some other company or person." (citing cases.) See also *Hutchinson on Carriers*, 3rd. ed., § 574.

The power of a state legislature to authorize the appropriation of private property for public use, or to authorize the appropriation of the property of one person for the benefit or convenience of another, was the subject of considera-

tion in the recent case of *Chicago, Milwaukee & St. Paul R. R. Co.* v. *Wisconsin*, 238 U. S., 491. It appeared in that case that a few years ago the legislature of Wisconsin had enacted a law prohibiting railroad companies from letting down the upper berth in a section of a sleeping car and preparing it for occupancy unless it had been engaged by a passenger. The object of the statute was to give to the occupant of the lower berth the convenience of the whole section upon payment of the price of the lower berth only. An appeal was made to the police power of the state to sustain the legislation on the ground of ventilation, better sanitary conditions, legislative discretion, etc., just as similar arguments were urged in these cases in the courts below. This court nevertheless reversed the judgment of the supreme court of Wisconsin, which had sustained the statute, and decided that the company had a right to withhold from the occupant of the lower berth the convenience of the upper berth unless he paid the regular charge for the entire section. It was also held that the space occupied by the upper berth was property which the company kept to sell to its patrons and could not be appropriated for the convenience of anyone without compensation, even though it was not immediately needed by the company for another passenger.

Reference to this case is made to recall the rule that property and property rights cannot be impaired or destroyed by a mere assertion that an indefinite power, useful within rational limits, may be used to weaken or destroy the property

guards of the constitution. It is certainly not to the interest of the state, nor any of its municipalities, that property should be confiscated or rendered insecure unless required by some overruling necessity, which does not exist in these cases.

The importance of this rule was emphatically stated by Judge Story in his work on the constitution, section 1790, and the necessity for protecting it against gradual and subtle impairment on plausible grounds was forcibly presented in the opinion in *Boyd* v. *United States*, 116 U. S., at p. 635.

III.

The statute of 1912, under which the detectives claimed the right to ride free upon the cars of the street railway company, is not a legitimate exercise of the police power to provide for public safety.

It was insisted in the courts below, and the argument may be advanced here, that it was competent for the legislature of New Jersey to pass and enforce the act of 1912 as a police regulation for the purpose of protecting the public and preventing and detecting crime. Evidence was offered in the police court that detectives sometimes board cars in search of pickpockets; but neither Coyle nor Noble was on the cars from which they were ejected for that purpose or in the actual exercise of their authority for any purpose. **They were there as passengers, using**

the cars as a convenience to arrive more quickly at their destination. For aught that appears in the case they were the only passengers on the cars during their entire trip.

The argument that because policemen may be needed to quell disturbances, to arrest lawbreakers, and to protect the public on street cars and therefore may ride free when not needed to exercise their authority, would justify their entrance at any time into any building where a violation of law may possibly occur, and require their entertainment by the owner. The same argument would compel a steam railroad company to transport policemen or detectives from one side of the continent to the other, and perhaps to furnish them with meals *en route*, because possibly their services might be called for somewhere on the journey. Such arguments were answered effectively by the supreme court of Kansas in the case of *Ex parte Gardner*, from which a quotation was made, *supra*, p. 12. Besides, the police power must be exercised subject to the constitution of the state, and of the United States; and the provision in the constitution of New Jersey which prevents private property from being taken for public use without just compensation (Comp. Stat., p. lviii), and the fourteenth amendment of the constitution of the United States which protects every person from being deprived of his property without due process of law, impose restraints on the police power of the state.

In *re Jacobs*, 98 N. Y., 98, Judge Earl, speaking of the police power of a state, remarks (p. 108):

> "But the power, however broad and extensive, is not above the constitution. When it [the constitution] speaks, its voice must be heeded. It furnishes the supreme law, the guide for the conduct of legislators, judges and private persons, **and so far as it imposes restraints,** the police power must be exercised in subordination thereto."

In *Atchison, Topeka & Santa Fe R. R. Co.* v. *Vosburg*, 238 U. S., 56, this court said at page 59:

> **"But we cannot at all agree that a police regulation is not, like any other law, subject to the 'equal protection' clause of the fourteenth amendment.** Nothing to that effect was held or intimated in any of the cases referred to. The constitutional guaranty entitles all persons and corporations within the jurisdiction of the state to the protection of equal laws, in this as in other departments of legislation."

IV.

The imposition in question cannot be sustained as a tax or an assessment.

The argument that the imposition in question may be sustained under the taxing power was tersely and effectively answered by the supreme court of New Jersey in the case of *D. L. & W. R. R. Co.* v. *Public Utilities Board*, 85 N. J. L., 28, at page 38, as follows:

> "The notion that such a taking of property may be justified as a revenue raising

measure intended to eke out the salaries of state officials, although touched upon in the brief for the railroad company, is not alluded to in the brief of counsel for the board, hence it need not be considered and may be dismissed with the comment that such argument would run counter to pretty much everything that has been decided touching taxing acts both as to their titles and substance; as matter of fact most if not all of the officials affected by this legislation at its inception were paid in whole or in part by fees, *i. e.*, an indeterminate sum and not a stated salary. Moreover a law that levied upon railroad companies a tax equal to the price of a fare for every ride a certain person chose to take would make the amount of such tax dependent wholly upon the will of such person, a thing unheard of in the law of taxation. The point, however, for obvious reasons is not made by counsel for the board."

One of the theories advanced in the opinion of the supreme court, on which to sustain the act in question, is that the property, *i. e.*, the services of the company, is not taken for public use entirely without compensation because possibly the presence of policemen or detectives in the cars may occasionally protect the passengers from violence, and their property from thieves, and so avert liability of the company. This curious view of the matter will appear clearly on reflection to be untenable. The company is a taxpayer. Its property is not only taxed *ad*

valorem, but it pays into the public treasury for the support of government five per cent. of its gross receipts in addition (Comp. Stat., p. 5285, secs. 497 & 500), and it is entitled to have its rights and property protected by the public authorities *without additional or special contribution to the public treasury.*

Private property cannot be taken for public use in New Jersey without just compensation, to be paid *in money.* The estimated or supposed value of some alleged partial equivalent other than money is not the compensation required by its constitution. *Butler* v. *Sewer Commissioners*, 39 N. J. L., 665; *Cherry* v. *Keyport*, 52 N. J. L., 544.

In the important case of *Carson* v. *Coleman*, 11 N. J. Eq., 106, it was held that "the legislature has not the power to declare that the benefits which an individual is to derive from a contemplated enterprise shall be taken by him as compensation for his property taken. This is not the compensation contemplated by the constitution. The owner of the property taken must be compensated *in money.* The constitution means that a fair valuation shall be made of the property taken, and the amount of such valuation, *in money*, shall be paid before the property is appropriated." And on page 108 of the opinion in that case Chancellor Williamson said:

> "It was intimated, by the defendant's counsel, that the legislature intended that the benefits which must necessarily accrue to the complainant from the proposed improvement should constitute his compensation. But

such a compensation is not the one contemplated by the constitution. There is but one fair construction to be put upon the language of the constitution. It means that, where private property is taken by virtue of the authority of the sovereign power, compensation shall be made *in money;* that a fair valuation shall be made of the property taken, and the amount of such valuation in money shall be paid to the individual before his property can be taken from him. Any other construction would make this provision of the constitution utterly valueless. **A means of legislation could soon be devised to substitute an imaginary benefit for that just compensation which was intended to be provided."**

When the taking is of the use instead of the substance of property the same rule must apply.

In the leading case of *Tide-water Co.* v. *Coster,* 18 N. J. Eq., 518, the late chief justice Beasley, at the close of his opinion, after denying the power of the legislature to impose burdens on persons or property without a previous ascertainment of the amount of special benefit conferred, and to that amount only, declared:

"The principle is one of great importance; for if the burdens of the community can be thrown upon a small class, whose position is not peculiar or different from that of the rest of the people, there can be no security for private possessions. To permit individuals to be taxed to pay for a public improvement to the extent of the peculiar bene-

fit which they receive from such improvement, is not unjust or inequitable; but any exaction beyond this, exclusively from such individuals, is an act which involves the ability, on the part of the community, to confiscate, for its own purposes, the property of the citizen. **Such power has not, by the constitution of this state, been placed in the hands of the legislature;** and as the act in question has, in the particular adverted to, exercised such power, it is in my opinion void." (page 531.)

In New Jersey it is impossible for the legislature to authorize private property to be taken for *private* use even by making just compensation. That, however, is not the rule in Massachusetts, and perhaps in some of the other New England states, nor in the western states in respect to water rights. In the New England states where the development of water power is a matter of importance, and perhaps of public concern, and it not being considered desirable that such development should be made by the public authorities, the rule has been established that the owner of a site where water power can be developed may, **upon making full compensation,** build a dam and flow riparian property of other parties above the dam. *Head* v. *Amoskeag Mfg Co.*, 113 U. S., 9. This doctrine, however, is no authority whatever for the statement that private property may be taken for public use, or private property for private use, *without compensation,* or for partial compensation, or for a consideration that cannot be definitely ascer-

tained and valued. In some of the western states where irrigation has become a matter of necessity it has been held that an owner of land may acquire by condemnation a right to construct or enlarge a water course across his neighbor's property upon making compensation. *Wurts* v. *Hoagland,* 114 U. S., 606; *Fallbrook Irrigation District* v. *Bradley,* 164 U. S., 112. But such cases are not authority to support the opinion under review, which holds that private property or the use of private property may be taken for public or private convenience without an ascertainment of its value and just compensation made therefor.

V.

Principal cases relied on by the defendant in error.

The defendant in error in the court below relied considerably on the case of *Interstate Consolidated St. Ry. Co.* v. *Massachusetts,* 207 U. S., 79, affirming 187 Mass., 436, in which the validity of a statute of Massachusetts requiring street railway companies to sell tickets to school children at one-half the regular fare was considered and sustained. In that case there was no question of free transportation involved, and the decision was based expressly upon the ground that when the street railway company was incorporated a statute was in force in Massachusetts which provided that street railway companies should be **"subject to all the duties, liabilities and restrictions set forth in all general laws now or**

hereafter in force relating to street railway companies," and the statute requiring the sale of tickets to school children at half fare was in force at that time. This court put its decision expressly upon that ground, saying:

> **"A majority of the court considers that the case is disposed of by the fact that the statute in question was in force when the plaintiff in error took its charter and confines itself to that ground."**

The statute now in question was not in force when Public Service Railway Company was incorporated, and, therefore, the ground on which the Massachusetts case was decided is not present in this case. The remarks in the opinion in the Massachusetts case, p. 85 &c., as to the power of the legislature to require street railway companies to transport school children for half fare for other reasons than the statute were declared to be the personal views of the learned justice who wrote the opinion and not the judgment of the court.

The supreme court of Massachusetts in deciding the *Interstate Company case*, said:

> "As a police regulation in the interest of education, the law may well require street railway companies to permit these children to ride to school upon their cars, without profit to the companies, **provided it can be done without causing them loss. But if such a requirement involves expense, the cost can only be put upon the general taxpayers. It cannot be imposed upon the street railway companies, or upon that part of the public**

which pays fares to street railway companies. If, therefore, it plainly appeared that the enforcement of this section would cause expense to street railway corporations, which they must bear themselves, or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination." (73 N. E., 532.)

This agrees substantially with the case of *Wilson* v. *United Traction Co., supra.* **It is clear that to carry policemen and detectives free of charge would involve expense to the companies, and consequently cause them loss.** The case of *Interstate Railway Co.* v. *Massachusetts,* was confirmed in the subsequent case of *Commonwealth* v. *Boston & Northern St. Ry. Co.,* 212 Mass., 82; 98 N. E., 1075.

Several *dicta* were quoted to support the view of the defendant in error in the court below that under the power to alter, amend and repeal charters of corporations or general acts under which corporations may have been created anything can be inserted in a charter or certificate of incorporation by way of amendment that might have been lawfully inserted at the beginning. If that were the law it would be possible to force a corporation to enter into a contract or assume an obligation which it would have refused to accept or assume voluntarily. This manifestly cannot be done. *Zabriskie* v. *Hackensack & N. Y. R. R.*

Co., 18 N. J. Eq., 178. It was so decided in *D. L. & W. R. R. Co.* v. *Public Utilities Board, supra.*

There is no authority to sustain the proposition that under the power to alter, amend and repeal a charter of a corporation, the company may be compelled, while actually engaged in business, to render public service free of charge. To compel such service is to take private property for public use without just compensation (in the present case without any compensation), in direct violation of a familiar provision of constitutional law. *Chicago, M. & St. Paul Ry. Co.* v. *Minnesota*, 134 U. S., 418, 458; *D. L. & W. R. R. Co.* v. *Public Utilities Board, supra. Lord* v. *Equitable Life Assur. Society*, 194 N. Y., 212; 87 N. E., 443; *Sinking Fund Cases*, 99 U. S., 700; *Williamson* v. *N. J. Southern R. R. Co.*, 29 N. J. Eq., 311, at pp. 334-5.

The case of *Atlantic & Pac. R. R. Co.* v. *United States*, 76 Fed., 186, is a decision of a district court judge for the southern district of California, and simply decided that where a company was organized by a statute which provided in express terms that it should be for postal, military and naval service, "and also subject to such regulations as congress may impose restricting the charges for such government transportation," congress might fix a limited rate for military transportation.

The case of *San Antonio Traction Co.* v. *Altgelt*, 200 U. S., 304, turned, as the opinion at its beginning recites, on the construction and validity of certain legislative acts of the state of Texas

from 1874 to 1893, and the effect thereon of a provision of the constitution of Texas which recited that "no irrevocable or uncontrollable grant of special privileges or immunities shall be made; but all privileges and franchises granted by the legislature, or created under its authority, shall be subject to the control thereof." Subsequent to the adoption of that provision of the constitution an ordinance of San Antonio was passed granting an extension of time to two street railway companies, and imposing certain limitations upon the exercise of their franchises, among which was that "said street railway companies shall charge five cents fare for one continuous ride over any one of their lines, with one transfer to or from either line to the other." That was equivalent to a fare of two and a half cents for each company, in cases where transfers were used.

In 1903 an act was passed providing for the sale of school tickets at one-half the regular fare, and the question was whether that act violated the contract rights of the street railway company under the constitution. It was held that the "ordinance must be construed in connection with the constitution of 1876, which made all such privileges and franchises subject to the control of the legislature;" and consequently the company had no contract on which it could depend, and as it did not appear that carrying school children at half fare would be confiscatory, the statute was held to be valid. The court said:

> **"Under the bill of rights of the constitution the legislature could not reduce the fares**

to a confiscatory amount or to an amount which would render it unprofitable to operate the road." (pp. 309-10.)

In the case of *Fair Haven R. R. Co.* v. *New Haven*, 203 U. S., 379, it appeared that a street railway had been constructed on Chapel street in New Haven under a charter granted in 1862, which required the company "to keep the street between its tracks, with a space of two feet on each side of the tracks, in good and sufficient repair." In 1895 the duty of paving and repairing was imposed on all railway companies, and under that act a new pavement had been laid on Chapel street, and the company was called upon to pay the cost of the new pavement between its tracks and for two feet outside. The question in the case was whether under the police power, or the power to alter, amend and repeal, the obligation to repair an existing pavement could be changed so as to require the company to pay the cost of the repavement. It was held that as the pavement had a proper relation to the object of the grant to the company, and as the change in the obligation of the company was not exercised in mere oppression and wrong, but was consistent with the object of the grant to the company, there was no constitutional objection to it.

VI.

Decisions of the New Jersey courts on the power of the legislature to enact statutes compelling steam railroad and street railway companies to carry public officials free of charge.

Legislation in New Jersey requiring transportation companies to carry officials free of charge, which the courts of that state have considered has taken three forms: (1) provisions in charters for carrying free a few designated officials when on public business, which, having been accepted by the companies, are of course binding; (2) a similar provision in the general railroad law of 1873 (P. L., p. 106, sec. 37, and 85 N. J. L., pp. 31-2) which was imposed on all companies organized under that statute *ipso facto;* and (3) the revision of the general railroad law and statutes passed in subsequent years which undertake to impose obligations to carry officials free of charge by companies under no contractual obligation to do so, not only when the officials were engaged in public business, but whenever they chose to ride for any purpose. (P. L., 1903, p. 666, sec. 40; P. L., 1907, p. 187; P. L., 1911, p. 185—a remarkable statute; and P. L., 1912, p. 235.)

Similar obligations have occasionally been imposed on street railway companies by inserting such a provision in municipal ordinances granting consent to the construction of street railways in cities and other municipalities. Such

provisions being accepted were no doubt obligatory.

The first case on this subject decided by the courts of New Jersey is *D. L. & W. R. R. Co.* v. *Public Utilities Board, supra,* in which it was held that the legislature can not require a railroad company to carry a member of the state water supply commission without compensation.

The second case is *Public Service Ry. Co.* v. *Public Utility Board, supra,* in which the court held that where a street railway company was under a contractual obligation to carry members of the police force and fire department of a city free of charge, a rule of the company requiring members of the police force not in uniform to surrender tickets, furnished in packages by the company as a means of identification when riding on its cars, was reasonable.

The third case is *Herrmann* v. *Pennsylvania R. R. Co.,* 88 N. J. L., 526, in which it was held *by the supreme court* that it was possible for the legislature to compel railroad companies to carry the secretary to the governor free of charge, because "the good will of such an official might well be deemed advantageous to the railroads and his ill will something to be deprecated." (p. 530.) The judgment in the Herrmann case was reversed by the court of errors and appeals, in an opinion filed on the 20th of November last, because the law requiring the secretary to the governor to be carried free of charge was found to be unconstitutional as to railroads operating under special charters previously granted and containing no such provi-

sion. The opinion in full is appended hereto, *post*, p. 43. Attention is particularly called to the following expression:

> **"The supreme court held [in the Hoagland case, 85 N. J. L., p. 28] that inasmuch as the office in question was not within the charter contract of the railroad company the requirement of a later statute for the free carriage of the official in question was a taking of the property of the stockholders of the railroad company without compensation or due process of law, which was not justified as a valid exercise either of the police power or of the reserved rights of the legislature.**
>
> **"In this conclusion we concur, and think that in the present case upon the same grounds the similar statutory requirement as to the free carriage of the secretary to the governor is likewise unconstitutional."**

By reading the opinion in the case of *D. L. & W. R. R. Co.* v. *Public Utilities Board, supra,* commonly called the Hoagland case, from the name of the official who appeared in the litigation, one might get the impression that the learned justice who wrote it entertained the opinion that the legislature of New Jersey has power to compel railroad companies to carry free all public officials who are in a position to render their good or ill will a matter of interest to the companies. The opinion was evidently so understood by the justice who wrote the subsequent opinion of the supreme court in the Herrmann case. The

opinion, however, in the Herrmann case in the court of errors and appeals (which was written by the justice who wrote the opinion in the supreme court in the Hoagland case) states that it was not intended to hold in the Hoagland case that the legislature could compel railroad companies to carry officials in a position to be helpful or injurious without paying fare, but simply to state the fact alleged in the past to support such legislation. The explanation of the opinion of the supreme court in the Hoagland case appears in the following passage of the opinion of the court of errors and appeals in the Herrmann case:

> "It may be well, however, to point out that the language of the case cited [Hoagland case] upon which the court below based its judgment occurred not in the decision of that case, but in a discussion of the early history of the legislation under review for the purpose of showing that the legal theory advanced to support it had no application to the case then *sub judice*. Views stated in this connection were necessarily *dicta*, as to the soundness of which, for the reasons already stated, we express no opinion." (*post*, p. 47.)

It may be said in passing that the statement of fact in the opinion of the supreme court in the Hoagland case advanced as a basis for such legislation is by no means clearly established in the history of New Jersey. Another view is that prior to 1903 it was supposed to be impossible in that state to enforce such a law as

the statute of 1912 without violating rights of the transportation companies secured by the constitution, and for that reason no statute of that kind was enacted. The legislation of that character beginning in 1903 (*supra*, p. 33) and designed to compel steam railroad and street railway companies to carry public officials without charge when no contract required them to do so, seems to indicate that it was enacted because more officials desired to ride free than the transportation companies were willing to carry without compensation. The theory that public policy ever called for or justified such transportation is as strange as it is unsound. The evil—for it is an evil—has been extended so far that it is necessary for the transportation companies to appeal to the constitution for relief, because if the arguments advanced to sustain the act of 1912 are sound it would be difficult to find a limit to unjust and injurious legislation of that character.

The litigation in the New Jersey courts on this subject shows that it has been impossible so far to find a durable foundation to sustain such a statute as the act of 1912. The legal theory supposed to have been advanced in support of such laws and explained by the supreme court in the Hoagland case has been rejected as an erroneous inference from the opinion in that case (*supra*, p. 36). The basis of the opinion of the supreme court in the Herrmann case was what is now said to have been an erroneous understanding of the opinion in the Hoagland case. In the present cases three of the grounds selected on

which to sustain the act of 1912, namely (1) indirect compensation to the company; (2) a custom to which it had assented; and (3) the obligation to carry public officials is not a serious financial burden, have all been controverted or rejected either by the supreme court or the court of errors and appeals as untenable. (Trans. in Sutton case, No. 189, p. 18; 85 N. J. L., at p. 37, and *supra*, p. 36.) The only basis left was defined as nearly as it can be in the opinion of the supreme court in the Hoagland case, where it was said "it must be something that smacks of public policy or the police power" (84 N. J. L., at p. 36).

After all the various and conflicting arguments to support such legislation as the statute of 1912 have been passed in review a conclusive answer may be found clearly written in the constitution of every state, and in the constitution of the United States as follows: "private property shall not be taken for public use without just compensation." If that sentence needs any interpretation it may be found in the opinion of the court of errors and appeals in the case of *Williamson* v. *N. J. Southern R. R. Co., supra:*

> "Indeed, a right partaking of the nature of property * * * is clearly within the principle of the constitutional provision which protects private property from legislative action, and forbids its being taken without compensation for either public or private purposes. **This constitutional protection is thrown around property of every kind and description, and is not restricted to**

any particular mode of taking. A partial destruction or diminution in value is a taking within the meaning of the constitutional provision." (citing cases.) 29 N. J. Eq., 334.

VII.

The fact that the company had previously of its own accord carried detectives free is not a reason why it should be compelled by statute to continue to do so.

On the testimony of Captain Lee, that policemen had been carried free by street railway companies operating in Jersey City, and to which the Public Service Railway Company succeeded, during the sixteen years within his memory (Trans., both cases, p. 8), the state attempted in the courts below to found an argument that there was an "implied contract" between the city and the railway companies, or "prescriptive right" to carry such officers free, and that the liability descended to the Public Service Railway Company. In the opinion of the New Jersey supreme court in these cases it was remarked that this custom was in vogue when the Public Service company acquired its rights, and the court attempted for that reason to invoke the case of *Interstate Consolidated Street Ry. Co.* v. *Massachusetts, supra,* as a precedent in this case. **The New Jersey court of errors, however, held that the judgments in these cases are "not sustainable upon either of the other grounds, relied upon below, viz., that of indirect compensa-**

tion to the plaintiff in error, or that of a custom to which it had assented."

A clear distinction separates the case at bar from the Massachusetts case, and makes the alleged "custom" of free transportation of no avail here. In that case, as already observed, the antecedent practice was under the obligation of a *statute* which formed part of the charter of the railway company, *supra*, p. 27. Here, on the contrary, the so-called "custom" of free carriage of the police officers of Jersey City by the street railway companies was a pure gratuity extended by the companies without any obligation to grant it, nor power in the state or the police officers to demand or enforce it. This court had occasion to pass on the point in *Lake Shore & Michigan Southern Ry. Co.* v. *Smith*, *supra*. In that case it appeared that the railway company had for some time prior to the passage of the statute sold mileage books voluntarily. Of this "custom" as a support for the statute compelling the sale of such mileage books, or as a criterion of its reasonableness it was said:

> **"It is no answer to the objection to this legislation to say that the company has voluntarily sold thousand-mile tickets good for a year from the time of their sale. What the company may choose voluntarily to do furnishes no criterion for the measurement of the power of a legislature.** Persons may voluntarily contract to do what no legislature would have the right to compel them to do. Nor does it furnish a standard by which

to measure the reasonableness of the matter exacted by the legislature. The action of the company upon its own volition, purely as a matter of internal administration, and in regard to the details of its business which it has the right to change at any moment, furnishes no argument for the existence of a power in a legislature to pass a statute in relation to the same business imposing additional burdens upon the company." (173 U. S., 697.)

It may be that if a valid custom had been established having the force of law, expressing the law so established in a statute would not be objectionable. But there is no proof of such a custom in these cases.

In the case of *Runyan* v. *Central R. R. Co.*, 64 N. J. L., 67, referring to the practice of railroad companies to allow passengers to carry packages in cars other than baggage, which it was insisted prohibited the companies from ceasing that practice, the court said:

"The usage to be made a part of this contract of carriage must be established by plain and explicit evidence. *Steward* v. *Scudder*, 24 N. J. L., 96, 101. In the case of *Re Schooner Reside*, 2 Sumn., 567, Justice Story says: 'I own myself no friend to the almost indiscriminate habit of late years of setting up usages or customs in almost all kinds of business and trade to control, vary or annul the general liabilities of parties under the common law, as well as under the commercial law. It has long ap-

peared to me that there is no small danger in admitting such loose and inconclusive usages or customs, often unknown to the parties and always liable to great misunderstandings and misinterpretings and abuses, to outweigh the well-known and well-settled principles of law, and I rejoice to find that of late years the courts of law, both in England and America, have been disposed to narrow the limits and operation of such usages and customs, and to discountenance any further extension of them.'" See also *Wood* v. *Wood*, 1 Car. & P., 59; *Sewell* v. *Corporation*, *id.*, 392; *Steward* v. *Scudder*, *supra*; *Cope* v. *Dodd*, 1 Harris (Pa.) 33; *Nichols v. De Wolf*, 1 R. I., 277.

It has been thought proper to take up and consider in this brief the principal arguments commonly advanced in support of the view that private property employed in public service for hire can be taken without the consent of its owners for public or private use without compensation. Surely no sound public policy calls for or justifies such discrimination or injustice, and the cases in which the issue has been directly involved hold that it cannot be done without violating important rights protected by the constitution.

I respectfully submit that the judgments brought up for review by these writs of error should be reversed.

FRANK BERGEN,
Counsel for Plaintiffs-in-Error.

APPENDIX.

NEW JERSEY COURT OF ERRORS AND APPEALS.

No. 83. June Term, 1916.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,

vs.

L. EDWARD HERRMANN,
Respondent.

Submitted July 5, 1916.
Decided Nov. 20, 1916.

The provision of the general railroad law requiring that the secretary to the governor be carried free of charge is unconstitutional as to railroads operating under special charters previously granted and containing no such provision.

Appeal from supreme court, whose opinion is reported in 88 N. J. L., 526.

For the appellant, Vredenburgh, Wall & Carey, Esqs.

For the respondent, L. Edward Herrmann, Esq., *pro se.;* Herbert Boggs, Esq., Assistant Attorney General.

The opinion of the court was delivered by

GARRISON, *J.:*

The facts are stated in the opinion delivered in the court below and need not be repeated in

detail. It suffices to say that the respondent was secretary to the governor, an office created by statute; that such office was not within the provision for free transportation of the charter of any of the appellant's constituent companies, but was within the provision of an amendment to the general railroad law passed in 1907; and that the respondent held a certificate issued to him by the secretary of state in conformity to the amendment of 1914 which he tendered to the ticket collector of the appellant as entitling him to ride free of charge, which claim was denied by the collector and a fare demanded, which the respondent refused to pay, after which he was carried to his destination.

The main question is whether or not the certificate thus tendered lawfully entitled the respondent to ride without payment of a fare, and this in turn depends upon the constitutionality of the statute by the terms of which the appellant was required to carry the secretary of the governor free or charge.

In its legal aspects the case thus presented is identical with that of Hoagland passed upon by the supreme court in *Delaware, Lackawanna and Western R. R. Co.* v. *Public Utilities Board* (85 N. J. L., p. 28). Hoagland was a member of the New Jersey State Water Supply Commission, the members of which were by a similar amendment to the general railway law required to be carried free of charge. The question was the constitutionality of this requirement. The supreme court held that inasmuch as the office in question was not within the charter contract

of the railroad company the requirement of a later statute for the free carriage of the official in question was a taking of the property of the stockholders of the railroad company without compensation or due process of law, which was not justified as a valid exercise either of the police power or of the reserved rights of the legislature.

In this conclusion we concur and think that in the present case upon the same grounds the similar statutory requirement as to the free carriage of the secretary to the governor is likewise unconstitutional.

The court below reached a different conclusion because it thought that the case of the secretary to the governor was distinguishable from that of a member of the State Water Supply Commission in that "the good will of such an official (secretary to the governor) might well be deemed advantageous to the railroads and his ill will something to be deprecated," and this was deemed to bring the secretary to the governor within an exercise of the police power which the supreme court in the case cited had held could not be invoked to justify similar legislation as to a member of the State Water Supply Commission. If such characteristics of the office of secretary to the governor do not serve to distinguish that office from that of a member of the Water Supply Commission for the imposition of the police power and if they afford no basis whatsoever for the exercise of that power, it is unnecessary to consider whether there might be other characteristics, not pos-

sessed by the respondent, that would justify such legislation or to decide whether under any circumstances such an exercise of the police power could be supported. In either event it would not concern the respondent how the questions thus mooted were decided; while, on the contrary, their decision in the present case would foreclose either the railroads or the large class of state officials affected by such decision, who have not had their day in court.

The first question therefore that we are called upon to determine in deciding the case before us in whether the characteristics of the office of secretary to the governor bring such office within any valid exercise of the police power in respect to free transportation.

We think that this question must be answered in the negative for the reason that the good will or the ill will of a person is a matter that appertains to him purely as an individual and cannot in any sense be regarded as a characteristic of his office. It goes, therefore, without saying that a valid exercise of the police power could not be rested upon so unsubstantial a basis as the personal good will or ill will of the incumbent of a particular public office, the conduct of which must be presumed to be dictated by its incumbent's sense of public duty and not by the degree of success with which his good will has been secured or his ill will averted.

This determination disposes of the present case without reference to the more fundamental question upon which the court below based its judgment.

It may be well, however, to point out that the language of the case cited upon which the court below based its judgment occurred not in the decision of that case, but in a discussion of the early history of the legislation under review for the purpose of showing that the legal theory advanced to support it had no application to the case then *sub judice*. Views stated in this connection were necessarily *dicta*, as to the soundness of which, for the reasons already stated, we express no opinion.

Upon the question whether in the present case there was an implied promise on the part of the respondent to pay a fare, if the certificate he tendered had not the validity that he supposed it had, we think that then such a promise was implied. The alternative view, viz., that the respondent designed to secure the service he demanded without making any payment therefore, if it turned out that he was wrong in supposing that the certificate tendered entitled him to free carriage, is entirely untenable. Every legitimate presumption requires such an implied promise, and no legal difficulty stands in its way. The action was therefore properly brought against the respondent.

Our conclusion on the main question is that the amendment to the general railroad law requiring the secretary to the governor to be carried free of charge is unconstitutional, and that the judgment of the supreme court be reversed, to the end that the judgment of the first district court of Jersey City be reversed and judgment final for the appellant entered for the amount shown by the stipulation to be due.

Endorsed:

"Filed Nov. 20, 1916.

THOMAS F. MARTIN,
Clerk."

Office Supreme Court, U.
FILED
JAN 11 1917
JAMES D. MAHER

Nos. 189 and 190

Supreme Court of the United States

OCTOBER TERM, 1916

PATRICK SUTTON

Plaintiff-in-Error

vs.

STATE OF NEW JERSEY

Defendant-in-Error

FRANK MIHM

Plaintiff-in-Error

vs.

STATE OF NEW JERSEY

Defendant-in-Error

On Error

BRIEF OF DEFENDANT-IN-ERROR

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(October Term, 1916.)

PATRICK SUTTON, *Plaintiff-in-Error,* *vs.* STATE OF NEW JERSEY, *Defendant-in-Error.*	On Error.
FRANK MIHM, *Plaintiff-in-Error,* *vs.* STATE OF NEW JERSEY, *Defendant-in-Error.*	

BRIEF OF DEFENDANT-IN-ERROR.

Counsel for the plaintiffs-in-error relies upon two assignments of error found at pages 3 and 4 of his brief. They are, respectively,

(1) That the act denies to the plaintiffs-in-error the equal protection of the laws of the State of New Jersey; and

(2) The deprivation of property without due process of law.

Mr. Justice Swayze in his opinion on page 11 of the transcript of the Sutton record says:

> "Its constitutional validity is questioned because it is said to take the railway company's property without compensation. No other point was argued."

He evidently has reference to the motion for the discharge of the defendants contained in the language of Mr. Edwards in next to the last paragraph on page 10 of the said transcript.

In any event, it would seem as if the act should be sustained as an exercise of the police power, or under the provisions of an act entitled "An Act concerning corporations", Pamphlet Laws 1846, page 16. The sixth section thereof provides as follows:

> "6. *And be it enacted*, That the charter of every corporation which shall hereafter be granted by the Legislature, shall be subject to alteration, suspension and repeal, in the discretion of the Legislature."

or paragraph 11 of section 7 of Article IV of the Constitution of the State of New Jersey as amended, providing as follows:

> "The Legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be recognized and corporate powers of every nature obtained, subject, nevertheless, to repeal or alteration at the will of the Legislature."

This Court will not review the finding of facts by a Judge sitting without a Jury.

> *Dower v. Richards*, 151 U. S., 658;
> *Dooley v. Pease*, 180 U. S., 126.

POINT I.

The Act was within the reserved power of the State of New Jersey under the Act of 1846.

It does not appear, from the State of the Case, whether or not the companies owning the street railways in Jersey City, now operated by the Public Service Railway Company, were originally incorporated by special charter or under the general act concerning street railway companies. All that appears in evidence is the certificate of incorporation of the Public Service Railway Company, dated August 20, 1907, and the statement by the counsel for the plaintiff-in-error that the Public Service Railway Company entered into the possession and operation of street railway lines in Jersey City on the twentieth day of August, 1907, which street railway lines had been operated by other companies for many years previous thereto. (State of the Case, *State v. Sutton*, p. 10.)

If these companies were organized under the general laws relating to street railway companies, then, of course, their charters are subject to repeal or alteration at any time at the will of the Legislature, and if organized under special charters, granted since 1846, then such charters are subject to alteration, suspension and repeal, in the discretion of the Legislature, under the provisions of "An Act concerning corporations", P. L. 1846, p. 16, which provides that "the charter of every corporation which shall hereafter be granted by the Legislature shall be subject to alteration, suspension and repeal, in the discretion of the Legislature".

The provisions of this section of this act be-

came a part of each and every special charter thereafter granted by the Legislature.

State, Warren R. R. Co. v. Person, 32 N. J. L. 124, S. C., affirmed 32 N. J. L. 566;

State, S. O. & N. Horse R. R. Co. v. Douglas, Receiver, 34 N. J. L. 82;

State, M. & E. R. R. Co. v. Comm. of Railroad Taxation, 37 N. J. L. 228, S. C., affirmed 38 N. J. L. 473;

Little v. Bowers, 46 N. J. L. 300, S. C., affirmed 48 N. J. L. 370;

Montclair v. N. Y. & Greenwood Lake Rwy. Co., 45 N. J. Eq. 436.

The proofs being silent on this subject, no special charters having been offered in evidence, it should be assumed that the companies were incorporated under the general acts, or if not, under special acts subject to the reserved power of the Legislature to repeal, alter or suspend.

The power reserved by the constitutional amendment of 1875 is "to repeal or alter at the will of the Legislature". Article IV, Section VII, paragraph XI, State Constitution. The power reserved by the "Act concerning corporations", of 1846, is to alter, suspend and repeal, in the discretion of the Legislature.

In *Greenwood v. Freight Co.*, 105 U. S. 13 (1881), the Supreme Court of the United States considered the scope and effect of a clause in a general statute of Massachusetts, providing that every act of incorporation passed after a specified date shall be subject to amendment, alteration or repeal, at the pleasure of the Legislature. Mr. Justice Miller (p. 17) said:

"Such an act may be amended; that is, it

> may be changed by additions to its terms or by qualifications of the same. It may be altered by the same power and it may be repealed. What is it that may be repealed? It is the act of incorporation. It is this organic law on which the corporate existence of the company depends which may be repealed, so that it shall cease to be a law."

Under the reserved power to alter or amend, the Legislature may take from a franchise its exclusive character.

The Constitution of Ohio, adopted in 1851, provided that "no special privilege or immunities shall ever be granted that may not be altered, revoked or repealed by the general assembly"; that "the general assembly shall pass no special act conferring corporate powers"; and that "corporations may be formed under general laws; but all such laws may, from time to time be altered or repealed".

In *Hamilton Gas Light Co. v. Hamilton City*, 146 U. S. 258 (1892), the Supreme Court of the United States construed a statute under which the plaintiff corporation was incorporated. Mr. Justice Harlan (p. 269) said:

> "If the statute under which the plaintiff became incorporated be construed as giving it the *exclusive* privilege, so long as it met the requirements of law, of supplying gas light to the City of Hamilton and its inhabitants by means of pipes laid in the public ways, there is no escape from the conclusion that such a grant as respects at least its exclusive character, was subject to the power of the Legislature, reserved by the State Constitution, of altering or revoking it. This reservation of power to alter or revoke a grant of special privileges necessarily became a part of the character of every corporation formed under the general statute providing for the forma-

tion of corporations. A legislative grant to a corporation of special privileges if not forbidden by the Constitution may be a contract; but where one of the conditions of the grant is that the Legislature may alter or revoke it, a law altering or revoking, or which has the effect to alter or revoke the exclusive character of such privileges, cannot be regarded as one impairing the obligation of the contract, whatever may be the motive of the Legislature, or however harshly such legislation may operate, in the particular case, upon the corporation or parties affected by it. The corporation by accepting the grant subject to the legislative power so reserved by the constitution, must be held to have assented to such reservation."

See:

Wilmington City Rwy. Co. v. Wilmington & Brandywine Springs Rwy. Co., 46 Atl. Rep. 12 (Del. 1900);

Wilmington City Rwy. Co. v. Peoples' Rwy. Co., 47 Atl. Rep., 245 (Del).

An exemption from taxation by legislative grant may be abrogated or repealed, under the reserved power to alter or amend.

In *State, Protestant Foster Home Soc., Pros. v. Mayor, etc of Newark*, 35 N. J. L. 157 (Sup. Ct., 1871), Woodhull, J. (p. 161), said:

"By the fifth section of the act to incorporate the said society * * * it is enacted that the property of the society 'shall not be subject to taxes or assessments.'

"The sixth section provides that the Legislature may, at any time, 'amend, modify, or repeal this act, as they shall think proper.'

"The reason most relied on for setting aside these assessments was that they are within the exempting clause of the fifth section of the charter and are, therefore, illegal. The power of the Legislature to grant the

exemption claimed * * * and the force and effect of such exemption, when contained in a charter subject to modification or repeal at the will of the Legislature, were fully considered in this Court, and in the Court of Errors in the case of *The State v. Miller,* and may be regarded as no longer open questions in New Jersey.

"Mr. Justice Elmer, in delivering the opinion of this Court, which was afterwards adopted as the opinion of the Court of Errors in the same case, on affirmance of the judgment below, says: 'That an act granting corporate privileges to a body of men, and expressly exempting them from taxation, becomes, when accepted, a contract which is protected by the constitution of the United Staes from being impaired, is too well established by judicial decisions by the action of the Legislature, and the acquiescence of the people to be questioned. But the weight of authority is equally decisive, that if the act reserves a right of repeal, the company takes the charter and the contract thereby implied or expressed subject to such alterations as the Legislature may deem expedient. *State v. Miller.* 1 Vroom 368; 2 Vroom 521.

"It may be assumed, then, that there is embodied in the charter * * * a contract, which until rescinded in the manner provided for in the act, furnishes a complete protection against all such burdens or impositions as were clearly intended by the Legislature under the designation of 'taxes and assessments' ".

In *Tomlinson v. Jessop,* 15 Wall., 454 (1872), the same question was passed upon by the United States Supreme Court. Mr. Justice Field (p. 458) said:

"The power reserved to the State by the law of 1841, authorized any change in the contract as it originally existed, or as subsequently modified, or its entire revocation.

> The original corporators, or subsequent stockholders, took their interests with knowledge of the existence of this power, and of the possibility of its exercise at any time in the discretion of the Legislature. The object of the reservation and of similar reservations in other charters, is to prevent a grant of corporate rights and privileges in a form which will preclude legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its contract with the corporators, which without that provision would be irrepealable and protected from any measures affecting its obligation. * * *
>
> "The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges and immunities derived by its charter, directly from the State. Rights aquired by third parties and which have become vested under the charter in the legitimate exercise of its powers, stand upon a different footing; but of such rights it is unnecessary to speak here. The State only asserts in the present case under the reservation to modify its own contract with the corporators; it does not contend for a power to revoke the contracts of the corporation with other parties, or to impair any vested rights thereby acquired."

An additional burden may be imposed under the reserved power to alter or amend, submission to which is the price of the continuance of the corporate franchises and privileges.

A company incorporated by a Pennsylvania statute in 1864, was authorized to construct a street railway on certain Philadelphia streets. The charter provided that the "company shall also pay such license fee for each car run by said company as is *now*, paid by other passenger rail-

way companies in said city." The license then was thirty dollars. A general statute, afterwards passed fixed the license fee at fifty dollars.

In *Railway Co. v. Philadelphia*, 101 U. S., 528 (1879), the Supreme Court of the United States held that:

> "the charter did not amount to a contract that the company should never be required to pay a license fee greater than that required of such companies at the date when the company was incorporated."

It further held that:

> "If the charter was sufficient to import such a contract, the Legislature under the constitutional provision in force at the time of incorporation touching the alteration, revocation or annulment of any charter in such manner that no injustice be done to the corporators, had ample power to pass the act increasing the license charge."

The charter of the Atlantic and Pacific Rail road Company provided that the directors "shall from time to time fix, determine and regulate the fares, tolls and charges to be received and paid for transportation of persons and property. It further provided, that the company should not charge the government higher rates than individuals for like transportation. It reserved to Congress the power, "having due regard to the rights of" said company, "to add to, alter, amend or repeal this act."

In 1892, Congress passed an act limiting payment to land-grant railroads for transportation of troops, etc., to rates which the Secretary of War shall deem just and reasonable, *such rate not to exceed* fifty per centum of such government transportation; as shall at the time be charged and paid by private parties for like or

similar transportation; and the amounts so fixed shall be accepted as in full for all demands for such service.

Pursuant to the act the Secretary of War established rates applicable to the Atlantic and Pacific Railroad Company at fifty per centum of its regular tariff rates.

In *Atlantic & Pacific R. R. Co. v. United States*, 76 Fed. Rep., 186, the Court held this statute and the action of the Secretary of War thereunder to be a legitimate exercise of the power reserved in the charter.

The San Antonio Street Railway Company obtained an extension of its franchise. The ordinance granting such extension provided "that the street railway companies shall charge five cents fare for one continuous ride over any of their lines, with one transfer to or from either line to the other."

At this time the bill of rights of the Texas Constitution declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority should be subject to the control thereof.

Later a statute was enacted which required street railway companies to sell tickets in lots of twenty to students not more than seventeen years of age when schools are in actual session at one-half the regular fare charged to adult persons.

In *San Antonio Traction Co. v. Altgelt*, 81 S. W., 106 (1904), the Texas Court of Civil Appeals sustained the statute. Justice Neill said:

> "If the ordinance * * * authorizing said company to charge five cents fare can be

> deemed a contract, which was 23 years after the adoption of the present Constitution which specially provides that all privileges and franchises granted by the Legislature or created under its authority shall be subject to its control, no obligation of contract between the city and said street railway company, or between the State and such company was violated or in any way impaired by the act of the Legislature in question. For the right * * * to charge five cents fare * * * did not vest until after the present Constitution went into effect, and therefore such regulation of fare was subject under it to legislative control. * * *
>
> "The Legislature has the power to regulate the rates of fare of a street railway company in the absence of any provision in its charter relinquishing that right * * *; provided, however, the rates established are not so unreasonable as to practically destroy the value of the property of the corporation, and thereby depriving it of its property without due process of law, and denying it equal protection of the law. * * *
>
> "It is not contended, and there is nothing in the evidence tending to show, that the rate of fare which appellee claims he is entitled to under the act of 1903, is such as not to leave to the company a sufficient income to pay repairs and a fair income on its investment."

In *San Antonio Traction Co. v. Altgelt*, 200 U. S., 304 (1905), the Supreme Court of the United States affirmed the judgment of the Texas Court, and sustained the statute. Mr. Justice Brown said:

> "Assuming, but not deciding, that the ordinance * * extending the franchise of the San Antonio Street Railway Company * * * constituted a contract *pro tanto*, the question still remains whether the provision 'that the

> street railway companies shall charge five cents fare' * * * constituted a contract with respect to which no further legislation upon that subject could be enacted without impairing its obligation. Even if construed as a contract, it was still subject to the provisions of the Constitution of 1876, which, in section 17 of the bill of rights, declared that no irrevocable or uncontrollable grant of special privileges or immunities should be made; but that all privileges granted by the Legislature or created under its authority shall be subject to the control thereof. * * *
>
> "Under the bill of rights of that Constitution the Legislature could not reduce the fares to a confiscatory amount which would render it unprofitable to operate the road. There is no allegation of that kind in this bill, and no evidence that the reduction of the school tickets in question would seriously impair its revenue. Indeed, it was found in the opinion of the court below that it was not contended there, and that there was nothing in the evidence tending to show that the rate of fare claimed by the appellee under the act of 1903, is not such as to leave to the company a sufficient income to pay for repairs and a fair income on its investment."

The charter of the Fair Haven R. R. Co., passed in 1862, provided that the company should keep the street between its tracks, with a space of two feet on each side of the tracks, in good and sufficient repair. The charter further provided that it might be altered, amended or repealed at the pleasure of the General Assembly. In 1895, a general statute was passed, providing, among other things, that, on all streets occupied by the track or tracks of any railway company * * * said company * * * shall be assessed and shall severally pay to the city the cost of paving and repairing the full length, and nine feet wide for each and every line of track on such railway * * *.

In *Fair Haven R. R. Co. v. New Haven*, 203 U. S., 379 (1906), the Supreme Court of the United States sustained this general statute, and this additional burden placed upon the railroad company thereby, under the reserved power to alter or amend. Mr. Justice McKenna (page 389) said:

> "We shall assume, for the purpose of our discussion, that the duty to repair did not include the duty to pave and repave. * * * Does the change and increase of burden upon the plaintiff-in-error come within the limitations upon the reserved power of the State? Has it no proper relation to the objects of the grant to the company or any of the public rights of the State? Can it be said to be exercised in mere oppression and wrong? All of these questions must be answered in the negative. The company was given the right to occupy the streets. It exercised this right first with a single track, and afterwards with a double track. Before granting this right the State certainly could have put upon the company the duty of paving as well as repairing. Such requirement would have been consistent with the object of the grant. It is yet consistent with the object of the grant. It is not imposed in sheer oppression and wrong, and the good faith of the State cannot be questioned. It is imposed in the exercise of one of the public rights of the State; the establishment, maintenance and care of its highways."

The language of Justice McKenna, at page 388, is exceedingly significant:

> "The limitation upon the power of amendment of charters of corporations has been defined by this court several times. It is said in one case that such power may be exercised to make any alteration or amendment in a charter granted that will not defeat or sub-

> stantially impair the object of the grant or any rights which have vested under it; which the legislature may deem necessary to secure either the object of the grant or any other public right not expressly granted away by the charter.
>
> "*Holyoke v. Lyman*, 15 Wall., 500, 522. In another case it was said that the 'alterations must be reasonable; they must be in good faith, and be consistent with the scope and object of the act of incorporation. Sheer oppression and wrong cannot be inflicted under the guise of amendment or alteration.'
>
> "*Shields v. Ohio*, 95 U. S., 319, 324. Later cases have repeated these definitions. *Sinking Fund Cases*, 99 U. S., 700, 720; *Greenwood v. Freight Co.*, 105 U. S., 13; *Close v. Greenwood Cemetery*, 107 U. S., 476. In the sinking fund cases, it was said that whatever regulations of a corporation could have been inserted in its charter can be added by amendment. All the cases are reviewed and their principles affirmed in *Stanislaus County v. San Joaquin C. & I. Co.*, 192 U. S., 201."

In the sinking fund cases, *Union Pacific R. R. Co. v. United States*, and *Central Pacific R. R. Co. v. Gallatin*, 99 U. S., 700, Mr. Chief Justice Waite, after reviewing the decisions of the United States Court upon this question, said, at page 721:

> "Giving full effect to the principles which have thus been authoritatively stated, we think it safe to say, that whatever rules Congress might have prescribed in the original charter for the government of the corporation in the administration of its affairs, it retained the power to establish by amendment. In so doing it cannot undo what has already been done, and it cannot unmake contracts that have already been made, but it may provide for what shall be done in the future, and may direct what preparation shall be

made for the due performance of contracts already entered into."

Under the reserved power to repeal, alter or amend, then, the Legislature may repeal a charter and destroy the corporate life and existence. It may, under the reserved power to alter or amend, revoke an exclusive right; it may, notwithstanding the charter exempts, subject the property of the corporation to taxation, and it may impose additional burdens not contemplated by the original incorporation, as the price of the continuance of the corporate franchises and privileges.

The test of the legitimacy of the exercise of the reserved power to alter or amend is well stated by Mr. Justice McKenna, above quoted, in *Fair-Haven, R. R. Co. v. New Haven*, supra. *Could the State have put upon the corporation the additional burden when granting the franchise? Is the requirement consistent with the object of the original grant? Is it imposed in oppression and wrong and in bad faith?*

If the amending act does not violate these three principles, then it is submitted it is a valid exercise of the reserved power.

Let us apply this test to the act under review in this case.

The statute (Chapter 159, P. L., 1912) imposes upon street railway companies the burden of carrying uniformed public officers, while in performance of their public duties, or police officers, acting as detectives, county detectives, or connected with the prosecutor's office, while in performance of their public duties, etc., without compensation. It is obvious that this burden could have been imposed as a limitation upon the original franchise, whether obtained by special grant or under the general law.

It is equally obvious that it is not inconsistent with the original object of the grant. The company was given the right to occupy the public streets to operate a street railway for the advantage of the public. A condition that certain public officers shall be carried free when on official duty does not interfere in any way with the performance of the object of the franchise. The burden, in so far as it concerns police officers and detectives, certainly is imposed in the exercise and to aid in the accomplishment of one of the highest of public duties, the enforcement of law and order and the suppression of crime. The statute may be fairly and reasonably construed to apply only to uniformed police officers, and those discharging police duties and exercising the powers of the police, although not uniformed. The conjunction of police officers not in uniform, and detectives as sharers with uniformed public officers, in the privilege granted of free transportation, indicates the legislative intent to grant free transportation to the uniformed and ununiformed police and other public officers not in uniform performing similar duties.

But should the act have a wider scope and meaning and necessarily include, as the plaintiffs-in-error contend, all public officers, as the law defines that term, if uniformed officers, or wearing a badge or insignia of office, "heads of health departments," "heads of fire departments", etc., or even uniformed members of the fire department of the municipality, inspectors of the State or local health departments, often uniformed, the act would not be invalid. It would still come within the reserved power to impose additional burdens not inconsistent with the object of the grant. The requirement of free transportation

of such officers, while in the discharge of their duties, would be an imposition in the exercise of a public right and duty of the State, the protection of the health of the community and the protection of property.

This question of the extent and scope of the reserved power to alter and amend was recently discussed by the Supreme Court, in the case of *D. L. & W. R. R. Co. v. Public Utilities Board*, 85 N. J. L., 28. The question actually decided in that case was that Chapter 129 of the Laws of 1911, amending the fortieth section of the general railroad law, in so far as it provided that members of the State Water Supply Commission should pass and repass, free of charge, over all the railroads operated in this State, was not an exercise of the reserved right of the Legislature or the police power, but constituted a taking of property without due process of law.

The Court, in that case, lays down the following rule governing the exercise of the reserved power, namely:

> "The reserved right of the Legislature to alter the charters of corporations, whether such right be reserved in such charters or derived from general laws, is the continuing right of the Legislature to regulate, in the interests of the public, the corporations of this State, and as such does not justify the imposition upon a corporation of an alien duty not regulative in its character, or subservient of any public interest."

The learned justice, who wrote the opinion of the Supreme Court (pp. 32-33), says:

> "This suggestion of a limit to the exercise of such reserved right implies, and is intended to imply, that such right is neither so narrow nor so broad as counsel have re-

spectively contended, i. e., that it is not so narrow as to preclude substantial regulation of the right previously granted, if required for the public good, and that it is not so broad as to justify the arbitrary imposition for alien purposes of provisions not regulative in character and for the public good that conflict with or substantially impair such right. * * *

"In cases of the repeal or suspension of charters the public good is the sole criterion, but in cases of their alteration, with which alone we have to deal, an added requirement is that such alteration shall bear such relation to the original charter as to be in effect regulative of the rights and duties thereby conferred or imposed. * * *

"So that a rough test of any alteration enacted under the supposed sanction of the reserved right of the Legislature would be: Is it a regulation for the public welfare of those rights and duties with which the corporation has been invested? If the enactment does not in some sense or in some sort subserve these purposes it is not an exercise of the reserved right of the Legislature * * *."

And again on page 37:

"It is one thing, for instance, to say to the railroad companies, 'For reasons of public policy you must carry free of charge the members of the Legislature by whom the laws affecting you and your interests are made', and quite a different thing to say to such companies, 'You must carry free of charge the members of the State Water Supply Commission, whose activities in nowise affect you or your affairs.'

"The first is an exercise of both the police power and the reserved right, the second takes the property of the stockholders without due process of law."

No cases are cited in support of this rule, and it is respectfully submitted that the rule thus

laid down is too narrow, and is not in accord with the broader decisions of the Supreme Court of the United States, above quoted and referred to. The learned justice holds the legislation he is considering to be, in effect, a taking of property without due process of law, and, therefore, violative of the Fourteenth Amendment of the United States Constitution. The United States courts have held, as heretofore pointed out, acts similar in character not to be violative of this amendment, and the test rule laid down by Mr. Justice McKenna, in *Fair Haven R. R. Co. v. New Haven, supra*, is certainly much broader and should prevail. The test is, as he states it: "Could the additional burden have been placed upon the company before or in the grant of the franchise? Would the requirement have been consistent with the object of the grant? Has it any proper relation to the object of the grant, or to any of the public rights of the State?"

And it was held that a statute imposing a heavy burden upon the street railway company not contemplated in and by the original grant, namely, to pave and keep in repair (in a double track road) eighteen feet of the street pavement for the whole length of the streets occupied by the tracks of the company, was not a taking of private property without due process of law, but was a legitimate exercise of the reserved power to alter or amend. And yet, clearly, this law would have been invalid under the test rule laid down by the learned justice, in *D. L. & W. R. R. Co. v. Public Utilities Board*. Surely, the requirement that a railroad company shall have a part of the public street of a city with such pavement as the authorities may require is not regulative in character, and is alien to the purposes of the original

grant. So the Act of Congress, upheld by the Supreme Court of the United States, in *Atlantic & Pacific R. R. Co. v. United States, supra,* requiring certain railroads to transport troops at rates to be fixed by the Secretary of War, and not in excess of fifty per centum of the rates charged to private parties, might be regarded as alien to (although not inconsistent with) the purposes of the franchise, and certainly was legislation not in the interests of the company, and in nowise regulative of the company or its affairs. The original grant to the company provided only that the company should not charge the government higher rates than individuals for like transportation, but, under the reserved power to alter and amend, Congress was justified by the Supreme Court in requiring the railroad company to accept a rate, not only less than that provided in the charter, but a rate to be entirely within the discretion of an officer of the government. If it be true, as stated by the learned justice in *D. L. & W. R. R. Co. v. Public Utilities Board*, that the right of a railroad company to receive pay for the transportation of its passengers is property, as much as gas or water, or electricity, is the property of corporations authorized to deal in those commodities, then it would seem that this act of Congress would be a taking of private property without due process of law.

Of course, the reserved power to alter or amend must be exercised for the public good, and must not be so exercised as to result in confiscation of the property of the corporation affected, or of its stockholders. *And it is respectfully submitted that this is the sole limitation which can properly and reasonably be imposed upon the exercise of this power by the Legislature.*

This Legislature, it would seem, is the sole judge of the public interest and of public policy. The Legislature alone can decide what the public good demands, and what public policy requires. By this statute under consideration, the Legislature has declared it to be for the public good and for public policy that these officers, specified in the statute, should be transported by the railroad companies free, when in the discharge of their official duties, and if this legislation does not result in confiscation of property, then, it is submitted, the courts cannot declare it invalid. There is nothing in the record to show that compliance with the act under consideration will impair the revenues of the plaintiff-in-error, nor to show that such compliance will prevent it from earning a fair return upon the fair value of its property devoted to public use. *San Antonio Traction Co. v. Altgelt*, supra. *Interstate Railway Co. v. Mass.*, 207 U. S. 79. And while it is true as suggested by the learned justice, in *D. L. & W. R. R. Co. v. Public Utilities Board*, that the cases laying down this doctrine are, in one sense, rate-making cases, yet the principle applies equally to the exercise of the reserved power to alter or amend. That additional burdens may be imposed under this power is undoubted. But additional burdens cannot be imposed to such an extent as to amount to confiscation, and the test of what is confiscation must be the same, whether the legislation is an exercise of the rate-making power or of the reserved power. Nor is there any evidence in the record to show that the railroad company, in performing the duty or the additional burden imposed upon them by this law, are put to any extra expense or liability. It cannot be assumed, nor is it contended, that it will be necessary for

them to run more cars; that it will deprive them of any fares from the general public they would otherwise receive. The utmost that can be said is that they would be prevented from collecting from these few officers the fares they otherwise might receive from them if they should ride when on official duty.

The statute now under consideration gives the right of free transportation to public officers only while upon public duty, and it would seem to be a valid exercise of the reserved power, even under the decision in *D. L. & W. R. R. Co. v. Public Utilities Board, supra.* It was the practice of the street railway companies for many years, and until its prohibition by the Public Utilities Act of 1910, to carry members of the police force free. This gratuity was deemed impolitic. The Legislature have now prohibited it, and made the free transportation of these officers, when on duty, obligatory. It is now a duty into the performance of which no element of gratuity can possibly enter. It is a regulation of a line of conduct that had already been entered upon by these street railway companies, and, being found inimical to public interests, was a proper subject for regulation, in the interest of the public. It, therefore, presents every element of the exercise of both the reserved right and the police power. These officers are acting in the interests of the railway companies, as well as in those of the general public. Their official activities affect these local street railway companies and their affairs as much as the activities of the Legislature affect steam railroads and their affairs. The protection of property, the enforcement of law and order, and the detection and prevention of crime, are directly in the interests of these companies.

The case of *Wilson v. United Traction Co.*, 76 N. Y. Supp., 203 Appellate Division, New York Supreme Court, cited in the brief of plaintiff-in-error, and greatly relied upon, is, it is submitted, not entitled to weight. True, it holds invalid a similar statute, providing for free transportation to police men of cities or incorporated villages, while in the performance of their duties, but the learned Court depends and founds its opinion upon the authority of *Railroad Co. v. Smith*, 173 U. S. 684. That was a case construing a statute requiring railroad companies to issue mileage books at a reduced rate of fare to those willing to purchase a designated number of miles at one time. The Court, in this New York case, holds that this statute is not a legitimate exercise of the police power. It does not consider, and, apparently, it was not in the case whether or not such a statute would be a proper exercise of the reserved power to alter or amend the charter of the street railway companies.

POINT II.

The passage of the Act of 1912 was a valid exercise of the Police power of the State.

The learned judge who heard and decided this case in the Supreme Court holds, in his opinion in the Mihm case, that this statute is a valid exercise of the police power, limiting its application, as he does, to members of the police. He says:

> "The statute of 1912 may fairly be regarded as an exercise of the police power of the State. Policemen are frequently required to be on street cars in the execution of their duties to preserve the peace, to enforce ordinances and

> to prevent or detect crime. It would be difficult to say that the mere presence of a police officer might not be of value for securing these objects, and it would be difficult if not impossible to distinguish in principle between his right, for example, to be on a crowded car to arrest pickpockets and his right to be on a car not crowded to enforce the ordinance against spitting. If he has the right to be there for these purposes it is impossible to say that his services may not at any time be required to prevent violations of law; at any rate, the Legislature might reasonably think so, and legalize his presence on the car without payment of fare." (*Sutton* case, State of Case, p. 12.)

We might well leave the case on this point, upon the reasoning of Justice Swayze.

But assuming that the statute must be construed to apply to all public officers in uniform, and that, in the language of the brief of plaintiff-in-error (pp. 27-28) any public official who is technically an officer, as the law defines that term, may demand free carriage while wearing the insignia of his office, if those insignia can be said to make him a uniformed public officer, it is submitted the statute is a valid exercise of the public power.

While the courts have found it impossible to frame and have deemed it unwise to attempt to frame, a definition of the police power which shall absolutely indicate its limits, yet it may be said that it is an attribute of sovereignty and exists without any reservation in the Constitution, being founded upon the duty of the State to protect its citizens and provide for the safety and good order of society. It corresponds to the right of self-preservation in the individual, and is an essential element in all orderly government,

because necessary to the proper maintenance of the government and the general welfare of the community.

Amer. & Eng. Encyc., Police Power, Vol. 22, p. 918, and cases cited in notes.

The police power is inherent in the several states, and may always be exercised by the State Legislature.

In *Barbier v. Connelly*, 113 U. S. 27, Mr. Justice Field, speaking for the Court, and discussing the Fourteenth Amendment, and its effect and restriction upon the police power of the States, said that this amendment, in declaring that no State should "deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws", undoubtedly intended not only that there should be no arbitrary spoliation of property, but also that no greater burdens should be laid upon one than are laid upon others in the same calling and condition. But he further says (p. 31):

> "But neither the amendment—broad and comprehensive as it is—nor any other amendment was designed to interfere with the power of the State, sometimes termed its police power, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the State, develop its resources, and add to its wealth and prosperity."

And again (on p. 32):

> "Class legislation, discriminating against some and favoring others, is prohibited, but legislation which, in carrying out a public purpose, is limited in its application, if within the sphere of its operation it affects alike all persons similarly situated is not within the amendment."

In *Commonwealth v. Interstate, &c., Street Rwy.*, 187 Mass. 436, the Supreme Court of Massachusetts held a statute requiring street railways to carry pupils of the public schools to and from school at rates not exceeding half the regular fare charged other passengers between the same points to be a valid exercise of the police power, although the statute did not apply to a particular company excepted, and the privilege was extended only to pupils of the public schools. It was held that the statute was not a violation of the Fourteenth Amendment, in that it did not apply to all street railways of the commonwealth did not aply to all persons using street railways, or even to all pupils, but only to pupils of the public schools. It was also held that the statute was not repugnant to the tenth article of the Massachusetts Declaration of Rights, nor to the Fifth and Fourteenth Amendments of the United States Constitution, in that it did not deprive the railway company of its property without just compensation, nor without due process of law. The Court, in the very able and interesting opinion of Chief Justice Knowlton, holds that as a police regulation in the interest of popular education, the law may well require street railway companies to permit public school children to ride upon their cars without profit, provided it can be done without causing the companies loss. The learned judge concedes that if such requirement requires expense, the cost can only be put upon the general taxpayers: that it cannot be put upon the street railway companies, or upon that part of the public which pays fares. "If, therefore", say the learned judge, "it plainly appeared that the enforcement of this section would cause expense to street railway corporations which they must

bear themselves or put upon other classes of passengers in the form of increased fares to make good the loss from carrying school children at half rates, we should be obliged to hold that there was a taking of property without due process of law, through unconstitutional discrimination." The Court holds however that the selection of public school pupils as a class is not arbitrary, that it was possible for the Legislature to conclude that the requirement of the statute would not entail loss upon the street railway companies. And the learned Chief Justice concludes that, "nothing less than a certainty that the provision would cause loss to the railway companies or some of them would enable us to hold that the Legislature was powerless to make the requirement * * * It involves the consideration of facts which primarily are for the law-making power. All presumptions are in favor of the validity of legislation * * * The evidence offered by the defendant had no tendency to show that it would suffer loss by carrying these pupils at half the regular rates."

This decision of the Massachusetts Supreme Court was affirmed by the Supreme Court of the United States, in *Interstate Railway Co. v. Massachusetts*, 207 U. S., 79. It is true, as pointed out in the brief for plaintiffs-in-error, that the affirmance was not upon this point, but upon another point, namely, that the statute was in force when the railway company was incorporated and became part of its charter obligation under a provision of the incorporating act, but the Supreme Court of the United States did not qualify, or dissent from the view of the Massachusetts Court. It simply refrained from expressing any opinion upon the question of the police power and due

process upon which that Court decided the case, and rested its affirmance upon the other ground. The weight and reasoning and authority of the Massachusetts decision and the opinion of Chief Justice Knowlton is not, therefore, in anywise discredited. And in this very case in the Supreme Court of the United States, Mr. Justice Holmes, who delivered the opinion of the Court, after stating the position of the Court and the ground upon which the case is decided, speaking for himself, holds the statute a proper exercise of the police power, and not violative of the Fourteenth Amendment, and it appears from the report that Mr. Justice Harlan was of opinion that the constitutionality of the statute was necessarily involved, that the statute was not a denial of equal protection of the laws, and that it did not deprive the railway companies of their property without due process of law. The opinion of these very learned and able judges, while not carrying the authority of a decision of the Court, is certainly entitled to great consideration and respect by this Court.

This case now under consideration, it is respectfully submitted, comes within the reasoning and analogy of these cases above cited.

The statute under review is within the police power as an act of sovereignty founded upon the duty of the State to protect its citizens, and to provide for the safety and good order of society.

The State, in requiring these street railway companies to carry free while in discharge of their public duties these police and other officers, who are charged with the protection of life, property and public health, the detection, punishment and prevention of crime, is discharging its duty

and exercising its sovereignty. It is regulating and legislating in the interests of the health, peace, morals and good order of the people. It is not an arbitrary spoliation of the property of the railways. An equal burden is laid upon all of the class affected, namely, the street railways, the great and convenient arteries of travel of the local community. Its operation affects alike all of the class entitled to its benefits, namely, public officers, and the free transportation is given, not for the benefit of the individual, but for that of the public, that the public duties with which the officers are charged may be promptly and efficiently performed. It does not appear that this requirement of free transportation will entail any loss upon the railway companies. The mere fact that they will be deprived of profit for the carrying of these few public officers, where no loss, no actual increased cost is entailed, is not a deprivation of property without due process, and is no hardship.

In addition to the above, there is a close analogy between the cases at bar and the facts in *Tannenbaum v. Rehm*, 44 So. (Ala.), 432 (11 L. R. A. [N. S.], 700). Here a municipal ordinance required the admission of a police or fire officer in a theatre. The plaintiff was assigned to the defendant's theatre and brought his action to recover from the defendant for his pay under the ordinance, which provided that the owner of the theatre should be responsible therefor. The Court, in discussing the case, declared that the manifest object of the ordinance, to wit, the saving of human lives, was well within the police power of the City and that the fact of its disturbing the enjoyment of individual rights did not render it unconstitutional, though no provision was made

for compensating the owner of the theatre in money. The Court said it is not a taking of private property, but a regulation of it, and that "in the theory of the law" the owner is benefited by sharing in the benefits that flow from regulation.

It is a matter of common knowledge that pickpockets infest crowded trolley cars and that the rougher and more unruly elements of our population frequent the street car lines, especially at night, and cause not only annoyance, but frequent physical harm to the other patrons of the company. It is not only the right, but it is the absolute duty of the State to offset, as far as possible, these and many other dangers that are encountered under our modern complex civilization in just such agencies as these street car lines. To obtain the best results in this behalf from our police officers, it is manifest that they must be permitted to come and go upon the cars of the street railways in the performance of their duties without let or hindrance and not subject to the payment of any charge.

If payment of their fares is required of such officers, it is fair to assume that they will not be as active in their duties under the foregoing premises as would be the case under the conditions created by the act now being considered. All experience of human nature points to the recognized truth that men are not usually willing to spend their money in the discharge of a public duty.

Schwenk v. Wyckoff, 1 Dick. (N. J. Ch.), 560;

Spence vs. Morris, 38 Vr. (N. J. L.), 500.

The State, through the agency of the legislature, has created and permitted the formation of the highly complex entity, namely, a street railway company, which has, like most advances, given rise to a new application of the old methods of preying upon the public by the lawless element. Franchises are given to such companies of a highly valuable character. They are entitled to and receive very expensive police protection from the State. It would seem but necessary to state the proposition to make it clear that a reasonable regulation of such a company should be allowed.

Surely the purpose and intent of our constitutions cannot be strained to mean that such safeguards as are now under discussion shall not be provided.

As has been pointed out above, *Wilson v. United Traction Company* should not be invested with any great weight and it is submitted that none of the cases quoted on pages 12 to 19, both inclusive, are in point.

WHEREFORE it is urged that the police power of the State has been properly exercised in the passage of the act under consideration and that the judgment of the New Jersey Court of Errors and Appeals should be affirmed.

Respectfully submitted,

JOHN BENTLEY,
Of Counsel with Defendant-in-Error.

APR 19 1917
JAMES D. MAHER
CLERK

Supreme Court of the United States

OCTOBER TERM, 1916.

Nos. 189 and 190.

(Argued together by consent.)

PATRICK SUTTON,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

No. 189.
In Error to the Court of Errors and Appeals of the State of New Jersey.

FRANK MIHM,
Plaintiff in Error,

vs.

THE STATE OF NEW JERSEY,
Defendant in Error.

No. 190.
In Error to the Court of Errors and Appeals of the State of New Jersey.

Notes on Brief of Defendants in Error.

FRANK BERGEN,
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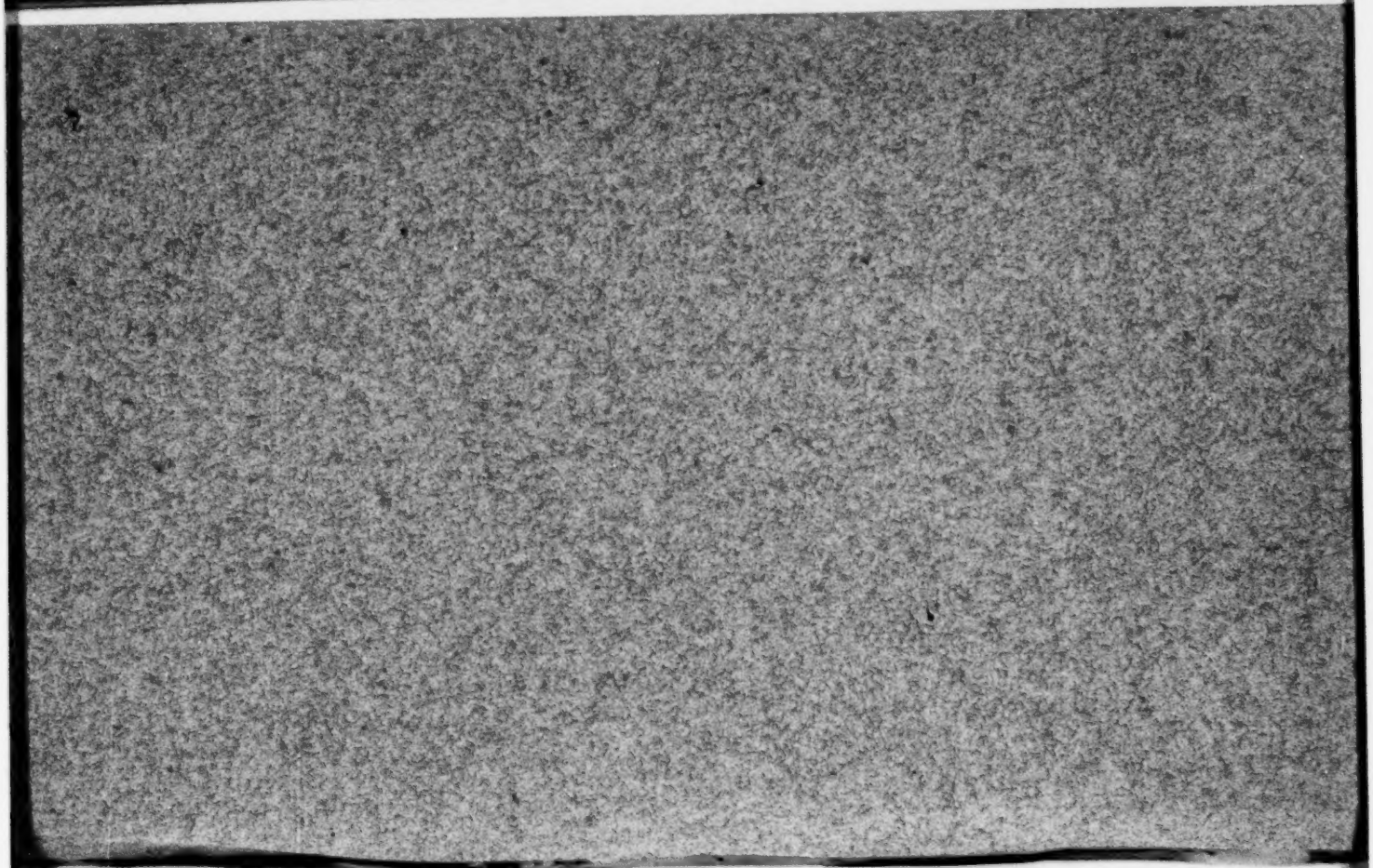

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FRANK MIHM, *Plaintiff in Error,* *vs.* THE STATE OF NEW JERSEY, *Defendant in Error.*	*No. 190.* *In Error to the Court of Errors and Appeals of the State of New Jersey.*

Notes on Brief of Defendants in Error.

Much of the brief submitted on the part of the defendants in error is devoted to a discussion of matters that are not disputed. It is no doubt true that authority in a statute or an ordinance, passed by legislative authority, to charge a particular rate for public service, such as fare on a railroad, will not be held to be a contract preventing the reduction of the rate. Such a

contract is only held to exist when the purpose to enter into it is entirely clear. Nothing in the nature of a contractual obligation is involved in this case. The existence of such an obligation was the issue involved in the case of *San Antonio Traction Co.* v. *Altgelt*, upon which the defendants in error appear to rely.

The power to alter, amend or repeal the charter of a corporation, or the general act under which a corporation may have been organized, does not authorize the confiscation of its property, or the appropriation of the use of its property without compensation while the corporation exists, or the seizure of its property by the public after the corporation has been dissolved. *People* v. *O'Brien*, 111 N. Y., 1; *Owensboro* v. *Tel. Co.*, 230 U. S., 58, 66; *Detroit* v. *St. Ry. Co.*, 184 *ib.*, at p. 395; *Reagan* v. *Farmers' Loan & Trust Co.*, 154 *ib.*, at p. 410; *Railroad Commission Cases*, 116 *ib.*, 307, 331.

The power to regulate the use of private property under the police power to protect the community does not include the power *to take* private property for public use, or *to compel the use* of private property by its owner for the benefit of the public or of any class in a community without compensation. Freund on Police Power, sec. 612; *In re Jacobs*, 98 N. Y., at p. 108.

The unqualified statement that any provision may be inserted in the charter of a corporation by way of amendment and after acceptance

which might have been inserted when the charter was granted, and of course before acceptance, is so palpably unsound that it may be passed without discussion. If that could be done property owned by corporations would be beyond the protection of constitutional law.

No one questions the right and duty of police officers and detectives to enter the cars of a street railway company to arrest criminals or to suppress disorder; but it does not follow that they may ride free of charge when there is no occasion for their official services on the cars. If such a rule should be established there would be no limit to the power of a state to billet public officials on corporations engaged in serving the public for hire.

I think the true rule is stated in the case of *Pennsylvania R. R. Co.* v. *Gebhardt,* decided by the supreme court of New Jersey on February 8th last, in which it was held that unless there is a contract obligation by a transportation company to carry passengers free of charge such an obligation cannot be imposed by a retroactive statute. The opinion in that case states: "In its essential features the case thus presented is indistinguishable from that of the secretary to the governor recently passed upon by the court of errors and appeals *sub nomine, Pennsylvania R. R. Co.* v. *Herrmann* (99 At. Rep., p. 404) [the opinion is printed in full in the opening brief, page 43, &c.]. In that case as in this the obligation to carry the public official in question free of charge rested upon no contract between

the railroad company and the state, contained either in the charter of such company or in the charter of any of its constituent companies, or in any general legislation under which any of such companies had been incorporated or under which they had received substantial accessions to their corporate powers." The pertinent expression in the *Herrmann* case is quoted in the opening brief on page 35. A copy of the opinion in the *Gebhardt case* is hereto appended.

I wish to emphasize the distinction between the right of a state to restrict the use of private property under the police power when necessary for the public welfare, and its right to seize private property for public use or to appropriate its use, as in the present case, to public purposes, or for the convenience of a class. The police power permits the former of these proceedings; a familiar provision in the constitution of New Jersey, and which appears perhaps in every written constitution in the country, forbids the latter. Plausible assertions cannot nullify provisions of constitutions designed to protect private property. (See cases referred to in opening brief, page 22.)

It is respectfully submitted that the judgments brought up for review should be reversed.

FRANK BERGEN,
Counsel for Plaintiffs-in-Error.

NEW JERSEY SUPREME COURT.

November Term, 1916.

PENNSYLVANIA RAILROAD COMPANY, *Appellant,* *vs.* WILLIAM C. GEBHARDT, *Appellee.*	*On Appeal.*

Submitted December 15, 1916. Decided February 8, 1917.

1. The provision of the general railroad law (Vol. 3, Comp. Stat., of 1910, Section 40) requiring that the clerk of the supreme court be carried free of charge is unconstitutional as to any railroad company that is under no contract obligation to perform that duty.

Before Justices Garrison, Parker and Bergen.

For the appellant, Vredenburgh, Wall & Carey, Esqs.

For the appellee, Josiah Stryker, Esq.

John W. Wescott, Esq., Attorney-General.

The opinion of the court was delivered by

GARRISON, *J.*

This appeal presents the question of the constitutionality of the statutory provision that the clerk of the supreme court shall pass free of charge over all railroads operating within this state. (P. L. 1914, p. 358.)

In the court below the constitutionality of this provision was assumed and judgment rendered for the defendant, the action having been brought by the railroad company for fares, which, but for such statutory provision, had been earned by the plaintiff.

From the judgment thus rendered, the railroad company has appealed upon the ground that the statutory provision in question is unconstitutional.

In its essential features the case thus presented is indistinguishable from that of the secretary to the governor recently passed upon by the court of errors and appeals *sub nomine, Pennsylvania R. R. Co.* v. *Herrmann* (99 At. Rep., p. 404). In that case as in this the obligation to carry the public official in question free of charge rested upon no contract between the railroad company and the state, contained either in the charter of such company or in the charter of any of its constituent companies, or in any general legislation under which any of such companies had been incorporated or under which they had received substantial accessions to their corporate powers. In the absence of any such contract obligation, it was held that a statutory requirement similar to the one now under review was an unconstitutional taking of the property of the stockholders of the railroad company that was not justified under the police power of the state or the reserved right of the legislature.

The sole point of difference that is relied upon to distinguish that case from the one before us, is that in the decided case the legislative pro-

vision for free carriage was enacted in 1907, whereas, in the present case such provision was enacted in 1873. It is not contended that this difference in dates gives rise to any contract right, on the contrary the earlier provision is sought to be sustained solely as a valid exercise of the police power; to which end an excerpt from the opinion of this court in the case of *Delaware, Lackawanna & Western R. R. Co.* v. *Board of Public Utilities Commissioners* (85 N. J. L., p. 28) is quoted and relied upon. The language thus quoted, as was pointed out by the court of errors and appeals in the Herrmann case, occurred in the discussion of a side issue of purely speculative interest that did not enter into the decision of the case. For this reason the soundness of the views suggested in this connection was not considered in the appellate court.

Now, however, when they are put forward by counsel as the basis for the decision of the case in hand, the views thus relied upon have been considered not for the purpose of determining their historical value in accounting for the probable motives that actuated earlier legislation, but for the purpose of determining their constitutional value in supporting such legislation as a valid exercise of the police power. Regarded in this latter aspect, we find nothing in the view urged by counsel, no matter from what source derived, that constitutionally justifies the imposition upon the stockholders of railroad companies of the financial burden of furnishing free transportation to State officials.

Insofar as such a view apparently receives support from the language of our earlier opinion, such language was unfortunate and calls for definitive treatment since its untoward results have not been effectually counteracted merely by pointing out the *obiter* character in which such language was employed.

In this connection we may add that no theory of the police power that has been suggested or brought to our attention justifies in our judgment the imposition of the statutory requirement under consideration by any general legislation, early or late, that does not in legal effect give rise to a contract obligation upon the part of the railroad company to perform the duty imposed upon it. The present case, therefore, is not distinguishable from that of *Pennsylvania R. R. Co.* v. *Herrmann,* and hence upon the authority of that case the judgment of the district court in the present case is reversed and judgment given in favor of the appellant for the sum due it by the stipulation of the parties in the court below.

Endorsed:

"Filed Feb. 8, 1917.

WM. C. GEBHARDT, *Clerk.*"